No. 91-2012-CFX Title: Jackie Holder, etc., et al., Petitioners
v.
E.K. Hall, Sr., et al.

Docketed: June 16, 1992 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jun 16 1992	Petition for writ of certiorari filed.
	Jul 16 1992	Brief of respondents E.K. Hall, et al. in opposition filed.
	Jul 22 1992	DISTRIBUTED. September 28, 1992
	Oct 5 1992	REDISTRIBUTED. October 9, 1992
	Oct 13 1992	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jan 19 1993	Brief amicus curiae of United States filed.
	Jan 27 1993	REDISTRIBUTED. February 19, 1993
	Feb 22 1993	REDISTRIBUTED. February 26, 1993
	Mar 1 1993	Petition GRANTED. limited to the following question: "Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. Section 1973."
		**********
	Apr 14 1993	Joint appendix filed.
	Apr 14 1993	Brief of petitioners Jackie Holder, et al. filed.
	May 4 1993	Request for extension of time to file respondents' brief on the merits denied.
	May 17 1993	LODGING by respondent. 20 copies of Exhibit A, unreported order of District Court opinion in Howard v. Commr. of Wheeler County, Georgia.
	May 19 1993	Brief amicus curiae of Lawyer's Committee for Civil Rights Under Law filed.
	May 19 1993	Brief amicus curiae of United States filed.
	May 19 1993	Brief of respondents Rev. E. K. Hall, et al. filed.
	Jun 10 1993	Record filed.
	Jun 21 1993	Reply brief of petitioners filed.
	Aug 2 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT MONDAY, OCTOBER 4, 1993. (2ND CASE).
	Oct 4 1993	ARGUED.

91-2012

No. _____

Supreme Court, U.S.
FILED
JUN 16 1992
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In The

Supreme Court of the United States

October Term, 1991

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

R. NAPIER MURPHY
Counsel of Record
for Petitioners

MARTIN, SNOW, GRANT & NAPIER
Post Office Box 1606
Macon, Georgia 31202-1606
(912) 743-7051

JOHN C. DANIEL, III
W. LONNIE BARLOW

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Voting Rights Act of 1965 empowers the courts to alter local government to ensure proportional minority representation?

2. Whether the legal analysis utilized by the Eleventh Circuit is contrary to the principles and mandates established by the Court in *Thornburg v. Gingles,* 478 U.S. 30 (1986)?

3. Whether the Eleventh Circuit erred by applying the "totality of circumstances" test to determine the three threshold requirements mandated by *Gingles* had been proven?

4. Whether Respondents established the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, as required by *Gingles*?

5. Whether Respondents established the minority group in Bleckley County is politically cohesive as required by *Gingles*?

6. Whether Respondents established the minority group in Bleckley County is sufficiently large and geographically compact to constitute a majority in a single-member district as required by *Gingles*?

7. Whether the district court was "clearly erroneous" in its findings of fact?

8. If the district court did misapply any legal standard, whether the case should be remanded in lieu of final determination by the Eleventh Circuit Court of Appeals?

II. LIST OF ALL PARTIES BELOW

The caption contains the names of all current parties to the proceeding. Respondents initially challenged the manner of electing the Bleckley County Board of Education and the Cochran City Council, but those claims were settled prior to trial, leaving only the claim against Petitioners that was tried in the district court.

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V. OPINIONS BELOW

On March 25, 1992 the Eleventh Circuit reversed the district court's judgment in favor of Petitioners, and on May 27, 1992 denied Petitioners' Suggestion of Rehearing En Banc. The Eleventh Circuit's opinion is reported at *Hall v. Holder,* 955 F.2d 1563 (11th Cir. 1992) and the district court's opinion is reported at *Hall v. Holder,* 757 F. Supp. 1560 (M.D. Ga. 1991).

VI. JURISDICTION

i. Date of entry of opinion below

The Opinion of the Eleventh Circuit Court of Appeals was entered on March 25, 1992, and this Petition for a Writ of Certiorari has been brought within 90 days of said Opinion as required by Supreme Court Rule 13.1.

ii. Petitioner's Suggestion of Rehearing En Banc

Petitioners filed a Suggestion of Rehearing En Banc on April 14, 1992, which was denied May 27, 1992.

iii. Not under Rule 12.3 (No cross-petition)

This is not a Cross-Petition, and Petitioners hereby assert that they know of no party who intends to file such a petition, thus the provisions of Supreme Court Rule 12.3 do not presently apply.

iv. Statutory provision allowing review

Review is sought pursuant to 28 U.S.C. § 1254(1) (1988) since Petitioners are asking the Court to review the

decision of the Eleventh Circuit Court of Appeals entered March 25, 1992.

VII. PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

i. U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ii. U.S. Const. amend. XV, § 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

iii. 42 U.S.C. § 1973 (1988) (*See* Appendix)

VIII. STATEMENT OF THE CASE AND FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

i. Course of Proceedings and Jurisdiction Below

Respondents filed this lawsuit on July 17, 1985 contending the single county commissioner form of

government in Bleckley County, Georgia, violates Section 2 of the Voting Rights Act of 1965 and rights secured by the Constitution of the United States. Respondents invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343(3), 1343(4) and 2201 (1988) (the suit being authorized by 42 U.S.C. §§ 1973 and 1983 (1988)). Petitioners filed an answer in a timely manner denying Respondents were entitled to the relief sought in their complaint.

The trial court, the Honorable Wilbur D. Owens, Jr., Chief Judge, presiding, entered its order and judgment in favor of Petitioners on March 7, 1991. On March 25, 1992, the judgment of the district court was reversed by the Eleventh Circuit and the case was remanded for the imposition of a remedy. Petitioners filed a Suggestion of Rehearing En Banc with the Eleventh Circuit on April 14, 1992, which was denied May 27, 1992.

ii. Statement of Facts

The Eleventh Circuit decision in this case will directly impact 17 local governments in Georgia, requiring expansion of these governments to ensure proportional minority representation.

The Court has never considered a challenge to a sole commissioner form of local government. In Georgia there are presently 17 counties utilizing this form of local government. The Eleventh Circuit has determined this form of local government to be violative of the Voting Rights Act of 1965 and empowered the district court to expand the local government in Bleckley County at least five-fold to ensure proportional minority representation.

The sole commissioner form of government in Bleckley County, Georgia is a single member position elected at large from a single jurisdiction, Bleckley County. This single district has a population of 10,767, of which 22% is black.

Bleckley County has utilized the single county commissioner form of government since the county's creation in 1912. *See* Bleckley, County of, Creation, No. 355, 1912 Ga. Laws 38-41. No black person has ever run for the position of county commissioner.

In 1986, a referendum was held, in accordance with legislation enacted by the Georgia General Assembly, on the issue of whether the county should adopt a six member county commission plan. Bleckley County – Board of Commissioners; Created; Referendum, No. 292, 1985 Ga. Laws 4406-11. The legislation proposing the Board of Commissioners was rejected by Bleckley County voters, and the sole commissioner form of government was retained by a vote of 1156 to 887. Status of Referendum Elections for the Years 1953 through 1986, 1987 Ga. Laws CLXXXII, CCLXXII. There was very little organized interest or support in the black community in regard to the 1986 referendum to expand county government. 757 F. Supp. at 1564 n.4; (Appendix, 9-10 n.4); (R4-320).

The district court pointed out "[t]here was no evidence presented at trial to suggest that the specific act of creating Bleckley County's single member commission belied a racial motivation on the part of the Georgia Legislature. . . . " 757 F. Supp. at 1562; (Appendix, 5-6).

Respondents also offered no evidence to support their allegation that the 1986 referendum was conducted

to maintain the sole county commissioner form of government for racially discriminatory reasons. The Bleckley County Grand Jury recommended the referendum because there was dissatisfaction in the county about a tax increase. (R5-597).[1]

Citizens of Bleckley County prefer the sole commissioner form of government because it is less expensive than a multi-member board, the county is small, the commissioner is accessible and responsive and the commissioner acts more as an administrator than a legislator. (R5-618).

Respondents offered no evidence that the county commissioner has ever been unresponsive to the needs of minorities. Indeed, the sole commissioner is the representative of the entire county, black and white, elected at large, and responsible to all voters. It is the simplest, most pure and economical form of efficient government for a small county.

As to local elections, there is no candidate slating process in Bleckley County. (R5-514; R4-392). There have been no county commissioner races in which racial appeals to voters were made. (R5-514).

Using the 1980 black voting age population of 1,474 as a constant, the percentage of the black voting age population registered to vote was 69.74% in 1988, compared to 68.12% for whites. (Defendants' Exhibits 18 and 19).

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[1] While the district plan allowing a multi-member commission to govern Bleckley County was rejected in the 1986 referendum, only four years earlier Bleckley County voters had approved a five-member district plan for the election of the Bleckley County school board. (R3-157).

Although Respondents made much reference to alleged barriers to voting, especially prior to the Civil Rights Act of 1964 and related legislation, the testimony of Respondents' lay witnesses established there have been no barriers to blacks registering to vote or voting in Bleckley County from at least 1964 to the present. (R3-58, 94; R4-259-60; R4-267, 286; R4-315-16). Black voter registration has steadily increased during that period of time. The proportion of the black voting age population registered to vote in 1988 was essentially equal to or greater than the proportion of the white voting age population registered to vote in 1986 and 1988. These statistics further reveal blacks comprise approximately 19% of the voting age population and approximately 19% of the actual registered voters in Bleckley County. As such, any alleged past discrimination in Bleckley County or disparities in education, housing or income do not presently hinder blacks from registering and participating in Bleckley County politics.[2]

Respondents' experts *did not analyze the results of any county commissioner election* or any other state or local election to determine if there was evidence of racial bloc voting for the challenged mechanism, the sole commissioner office. Instead, opinions and statistical data were presented by Respondents only in regard to the national

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[2] Although Respondents made much reference at trial to the educational system in Bleckley County *prior to desegregation*, there is only one school system in Bleckley County, and blacks and whites share one elementary school, one middle school and one high school. (R5-492). There are no private schools in Bleckley County. (R5-501).

campaigns of Jesse Jackson in 1984 and 1988. These opinions were based on a regression analysis of the 1984 election, a so-called homogeneous precinct analysis of the 1984 election and an exit poll conducted at the time of the 1988 election. *See* 757 F. Supp. at 1565-67; (Appendix, 13-19).

Respondents' expert, Dr. Richard Engstrom, admitted the statistical evidence alone provided little evidence from which a court could conclude that racially polarized voting exists in Bleckley County. (Appendix, 40-42); (R4-440-41, 483).

The final source of the statistical evidence presented by Respondents concerned the result of an exit poll taken at the time of the 1988 presidential preference primary involving Jesse Jackson. The evidence revealed the exit poll was deficient in many respects and the results were not reliable. (R4-399).[3]

The district court determined:

> Regardless of any possible assumptions which might be drawn from the actual 1988 presidential preference primary election returns, this court is not satisfied that the results of Dr. Willingham's 1988 exit poll provide an accurate source from which the plaintiffs might buttress their position that elections in Bleckley County are characterized by white bloc voting.

757 F. Supp. at 1578; (Appendix, 45).

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[3] The district court so noted by commenting that "the results of the poll were unrepresentatively skewed. . . . [T]he poll overemphasized the electoral support received by some candidates, most importantly Reverend Jackson, and underestimated the support harnessed by other candidates." 757 F. Supp. at 1577; (Appendix, 13-19).

Respondents chose not to conduct exit polls of other elections that were conducted after this lawsuit was filed in 1985, such as the 1986 referendum on the commissioner form or the 1988 general election which contained at least one race (public service commission) that involved a black candidate. Instead, Respondents focused their attention only on the two national campaigns of Jesse Jackson which, according to Respondents' expert, Dr. Alex Willingham, placed heavy emphasis on race. (R4-394-95). His campaigns alone are not dispositive of whether a consistent pattern of racial bloc voting has existed in local elections in Bleckley County, Georgia.

While Respondents did not analyze any county commissioner elections, Petitioners did perform a regression analysis on the 1980 and 1988 votes cast for defendant Holder in the county commissioner elections, and a determination of racially polarized voting could not be made. (R5-669-72).

As to other elections, Respondents admitted black candidate Robert Benham, for instance, received the votes of both white and black voters in Bleckley County in 1984 for the Georgia Court of Appeals. (R4-387-88). Judge Benham received over half of his votes from whites. (R5-467).

In City of Cochran elections, black candidate Willie Basby won three at-large elections for city council against white opposition. 757 F. Supp. at 1568; (Appendix, 20). Basby won twice by receiving a majority of the votes cast. *Id.*

IX. REASONS FOR GRANTING THE WRIT

i. The Voting Rights Act of 1965 does not empower courts to alter local governments to ensure proportional minority representation.

The Eleventh Circuit decision, which is a published opinion and binding precedent, directly affects the local government of 19 counties in Georgia. It empowers the district court, contrary to the Voting Rights Act, to expand those governments to ensure proportional minority representation.

Section 2 of the Voting Rights Act of 1965 was amended on June 29, 1982, and states, in part:

> *Provided,* that nothing in this section establishes a right to have members of a protected class elected and numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1988).

Moreover, subsection (a) of this statute is violated *only* when there is some standard, practice or procedure that denies or abridges the right of an individual "to vote" on account of race or color. *Id.*

There has never been an intent by Congress to set aside a form of government so that minority voters will automatically be able to elect minority candidates in proportion to their population in the electorate. Instead, the inquiry is whether the minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* Whether the candidate preferred by the minority voter is also a minority is not dispositive and is irrelevant. This was made clear by the Court in *Thornburg*

v. Gingles, 478 U.S. 30 (1986), wherein the Court held, in part, as follows:

> First, both the language of § 2 and the functional understanding of the phenomenon of vote dilution mandate the conclusion that *the race of the candidate per se is irrelevant to racial bloc voting analysis*. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to . . . elect representatives *of their choice*." . . . Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group, not the race of the candidate*, that is important.
>
> . . .
>
> Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis.

478 U.S. at 67-68 (emphasis added).

In addition, the Court in *Gingles* pointed out three limitations in the Senate Report which are highly relevant to the issues in this case, as follows:

> First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2; second, the conjunction of an allegedly dilutive electoral mechanism and a lack of proportional representation alone does not establish a violation; third, the results test does not assume the existence of racial bloc voting; the plaintiffs must prove it.

478 U.S. at 46.

The Senate Report accompanying the 1982 amendment to the Voting Rights Act sets forth the Senate factors to be considered in Section 2 cases. The Court in *Gingles*, however, made clear that while the Senate factors may be relevant to evaluating a minority vote dilution claim, "unless there is a *conjunction* of the following circumstances, the use of multi-member districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 48-49 (first emphasis added).

The Court in *Gingles* established three necessary preconditions that must be proven by plaintiffs asserting a Section 2 claim. These three necessary preconditions are as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. . . . Second, the minority group must be able to show that it is politically cohesive. If the minority group is politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests. . . . Third, the minority must be able to demonstrate the white

> majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed, . . . – usually to defeat the minority's preferred candidate.

478 U.S. at 50-51.

In light of the principles of law stated above, it is obvious that Section 2 of the Voting Rights Act of 1965 does not require proportional representation and does not give the courts the power to set aside a local government, redraw district lines or create new districts to ensure proportional representation. For example, in this case, the mere fact that a hypothetical commission of five-districts, one majority black, may be drawn does not in any way establish a Section 2 violation. As the Honorable Edith H. Jones stated in her concurring opinion in *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989),

> [Plaintiffs'] reasoning puts the cart before the horse, by authorizing a remedy for voter dilution before a violation of Section 2 has been found. Actionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model based upon whatever size is necessary to accomplish proportional representation. Adding council member districts "would create a voting rights violation where none presently exists by enabling appellants to meet the necessary preconditions of their Section 2 claim."

Id. at 543.

ii. The Eleventh Circuit's legal analysis was contrary to the Court's mandate in *Thornburg v. Gingles*.

The Eleventh Circuit admitted in its decision that there is a division within the Eleventh Circuit as to the evidentiary burdens that must be satisfied under *Gingles*. 955 F.2d at 1568 n.9. This lack of uniformity within the Eleventh Circuit as to the full contours of *Gingles* was also expressed in *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1543 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1108 (1991) and in the en banc decision in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990). The uncertainty of the Eleventh Circuit as to the contours of *Gingles* is readily apparent from its decision in the case sub judice in that the legal analysis utilized by the Eleventh Circuit is directly contrary to *Gingles*, and the evidence relied upon by the Eleventh Circuit in reaching its decision in no way establishes a Section 2 violation. As such, the decision of the Eleventh Circuit was based upon a misconception of the law and was clearly erroneous.

Prior to *Gingles*, the primary focus of the courts in Section 2 cases was the Senate factors set forth in the Senate Report accompanying the proposed 1982 amendment. Senate factors 2 and 7 state:

> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized; . . . and
>
> 7. The extent to which members of a minority group have been elected to public office in the jurisdiction.

In light of *Gingles*, the courts must first determine whether the Section 2 plaintiffs have proven the three necessary preconditions to their claim before looking to the Senate factors, i.e., the "totality of the circumstances". Senate factor No. 2 became the focus of the third precondition that must be proven under *Gingles*, i.e., that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 51. Racial bloc voting, whether it be viewed as Senate factor No. 2 or the third precondition under *Gingles*, is separate and distinct from the other Senate factors. While Senate factor No. 7 (and the other Senate factors as well) may be relevant if Respondents had produced evidence of racially polarized voting, neither Senate factor No. 7 nor the other Senate factors, i.e., the "totality", *prove* the existence of racially polarized voting. They are merely enhancement factors once the three *Gingles* factors are proven.

In *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), the Eleventh Circuit recognized the Senate factors may be relevant in evaluating a minority vote dilution claim, but that the court must first apply "a new three-part test focusing on the existence of a politically cohesive geographically insular minority group in voting along racial lines, as necessary preconditions for multi-member districts to operate to impair minority voter's ability to elect representatives of their choice." 829 F.2d at 1550. In the case at bar, in disregard of *Gingles*, the Eleventh Circuit relied upon the other Senate factors, i.e., the "totality", in determining if Respondents had satisfied the three preconditions to their claim.

In concluding that Respondents have produced sufficient evidence of racial bloc voting, the Eleventh Circuit enunciated its new legal standard of review as follows:

> Examining the issue of racial bloc voting under the totality of the circumstances existing in Bleckley County, we are forced to conclude that the district court reached a clearly erroneous decision based on its misconception of the law.

955 F.2d at 1570.

This standard of review is contrary to *Gingles* since it omits the requirement that the court independently address the issue of racial bloc voting. This is obvious when considering the court initially recognized the following while discussing the *Gingles* requirements:

> the *Gingles* decision places a "gloss" on the Senate Report factors, limiting the use of the factors by requiring that the three *Gingles* factors be established to prove a vote dilution claim.

Id. at 1568.

Based upon its misconception of the law, the court then based its determination that the *Gingles* preconditions had been established on factors in no way dispositive of the issues.

The Court in *Gingles* made clear that "the race of the candidate per se is irrelevant to racial bloc voting analysis." 478 U.S. at 67-68. The fact that the race of the candidate per se is irrelevant to a racial bloc voting analysis had been recognized by the Eleventh Circuit in *Carrollton*, wherein the court correctly interpreted *Gingles* to mean that it is the status of the candidate as the chosen representative of a particular race or group, not the race

of the candidate, that is important. 829 F.2d at 1557. This interpretation of *Gingles* was also recognized by the en banc decision of the Eleventh Circuit in *Solomon, supra,* 899 F.2d at 1021 n.12.

In this case, however, the Eleventh Circuit's *first consideration* under its "totality" review of the evidence submitted on the issue of racial bloc voting was as follows:

> Yet, blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government. . . . Lay testimony by Bleckley County's black community leaders, many of whom are seasoned local politicians, revealed a *belief* that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County, primarily because of the impact of the non-Cochran vote, a vote having a substantially lower percentage of blacks.

955 F.2d at 1570-71 (emphasis added).

This focus is directly contrary to the *Gingles'* mandate that "only the race of the voter, not the race of the candidate is relevant to vote dilution analysis." 478 U.S. at 68.

Even assuming the race of the candidate is relevant to a vote dilution analysis, the subjective *belief* of the witnesses proves nothing as it is speculative and conjectural. For example, in *Sonnier v. Vinton,* 484 F. Supp. 146 (W.D. La. 1980), the court rejected evidence that "blacks . . . had a defeatist attitude and did not believe that a black could ever become elected because of at-large voting," and held it "would not be sufficient to find that the

political process in Denton is not equally open to participation by blacks." *Id.* at 148-149.

The Eleventh Circuit erroneously gave undue weight to the subjective speculative "beliefs" of Respondents' witnesses and the fact that no black has run for the county commissioner position in finding Respondents had satisfied the third precondition, racial bloc voting. Respondents argue they could not produce statistically significant evidence of bloc voting in light of the limited number of black candidates. Since the race of the candidate is irrelevant, the Court allowed Respondents to sidestep their burden of proving the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[4] Although there were numerous and various elections that could have been analyzed by Respondents, they made the decision not to analyze *any* elections involving white candidates, and presented only statistical evidence as to two campaigns of Jesse Jackson, which Respondents admitted were not sufficient to establish a consistent pattern of racial bloc voting. (R4-440-41; R6-843).[5]

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[4] Respondents' expert, Dr. Richard Engstrom, offered opinions concerning the campaigns of Jesse Jackson solely because they involved a black candidate, yet he did not offer opinions concerning other elections, such as for county commissioner, that could be analyzed even though he admitted a white candidate can be the choice of black voters. (R4-448).

[5] Considering the sole commissioner form of government is the challenged mechanism, the most relevant evidence concerns the elections for that office. Petitioners analyzed the 1980

(Continued on following page)

The Eleventh Circuit's reliance on the fact that black candidates have been elected in City of Cochran elections after city elections were restructured with a black majority district was also misplaced. As the referred-to elections were not statistically analyzed, there is no evidence whatsoever that whites and blacks voted any differently within the district whereby the black candidate was successful. In other words, it could very well be that whites and blacks voted in the exact same manner and the successful black candidates received the white crossover vote. The Eleventh Circuit *obviously assumed* whites and blacks voted differently in these elections. The same "assumption" was made in regard to the elections involving J.B. Stoner, Lester Maddox and George Wallace, which were not analyzed.[6] This is contrary to *Gingles*, which requires "plaintiff's prove their claim before they may be awarded relief." 478 U.S. at 48 n.15. This proof is available through regression analysis, which Respondents used on one election only, the 1984 Jesse Jackson campaign.

(Continued from previous page)

and 1988 elections for county commissioner, and a finding of racial polarization and vote dilution could not be made. (R5-669-672). Moreover, respondents never established who the minority-preferred candidate was in any election or that he was unsuccessful, other than Jesse Jackson.

[6] Although not analyzed, the Eleventh Circuit assumes the number of votes cast for these candidates establish "Bleckley County indeed suffers from racially polarized voting" since Stoner, Maddox and Wallace received "significant support" in elections, all of which were more than 15 years prior to the trial of this case. The court thus concludes "a substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals as late as the mid 1970's, and that they voted accordingly." 955 F.2d at 1572.

It is also interesting to note that the Eleventh Circuit indicated that black candidates have been regularly defeated in City of Cochran elections before the district system was instituted. In making this statement, the Eleventh Circuit summarily dismissed Willie Basby, a local black politician who won three at-large elections, and referred to him as an "aberration," even though the court admitted Basby was able to gather "cross-over support from Cochran's white voters." *Id.* at 1746 n.16.

In determining Bleckley County suffers from racially polarized voting, the court also makes reference to socio-economic disparities and segregation that existed in Bleckley County until the 1960s (two characterizations applicable to all communities). These factors are not indicative of whether racial bloc voting exists, and this was made clear by the Court in *Gingles*:

> Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multi-member structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multi-member district.

478 U.S. at 48 n.15.

Moreover, the Supreme Court has directed that the "totality of circumstances" be considered based upon a practical evaluation of the past and present realities to

determine whether the political process is equally open to minority voters. 478 U.S. at 79.

Petitioners submit that it was the Eleventh Circuit, not the district court, that made "clearly erroneous" findings based on a misconception of the law. Respondents failed to establish the existence of racial bloc voting, the third necessary precondition under *Gingles*. Since they failed to establish racial bloc voting, the Eleventh Circuit also erred in finding Respondents established "political cohesiveness". This finding was also based on the erroneous finding that Respondents had established racial bloc voting. *See* 955 F.2d at 1573.

The Eleventh Circuit also erred, as a matter of law, in its finding that Respondents had proven the first precondition, that the black voters in Bleckley County are sufficiently numerous and geographically compact to constitute a majority in a single-member district. This finding was based on the argument that the single-member district in question can be further subdivided in a hypothetical fashion until blacks constitute a majority in one of five hypothetical districts.

This legal analysis is without basis since Bleckley County is itself a single-member district, and blacks do not constitute a majority within this district. 42 U.S.C. § 1973(b) (1988) specifically states, "nothing in this section establishes a right to have members of a protective class elected in numbers equal to their proportion in the population." Since black voters do not constitute a majority within the district in question, Respondents did not, and cannot, establish the first precondition to their claim.

In addressing the conflict in the circuit regarding proof, the Eleventh Circuit noted:

> the district court's legal interpretation of the evidence would support the district court's ultimate conclusion. . . .

955 F.2d at 1570.

Since the district court's decision was not based on misconceptions of the law and its findings were not clearly erroneous, under Rule 52 the Federal Rules of Civil Procedure the decision should have been affirmed by the Eleventh Circuit.

Although not necessary, the trial court went further than the threshold requirements and considered all of the facts and circumstances under the "totality of the circumstances." *See* 757 F. Supp. at 1582-84.

Since the district court did exactly what the Eleventh Circuit suggests should have been done, consider the totality of the circumstances, there was absolutely no basis for the Eleventh Circuit to reverse the judgment except to grant proportional representation to black voters in Bleckley County by subdividing the county further.

If the district court did use an erroneous legal standard, the Eleventh Circuit should have remanded, as it has done previously. In *Solomon, Carrollton* and *Meek*, the Eleventh Circuit reversed the judgment of each district court on the basis that the analysis of the court was premised on legal errors, but the court did not direct the district court to enter judgment in favor of the plaintiffs, as done in this case. Certainly, the district court was in a

much better position to evaluate the evidence, credibility of witnesses and so forth.[7]

A remand is consistent with *Gingles*, which recognized:

> Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

478 U.S. at 79.

iii. Specific reasons exist for granting this writ of certiorari that have importance beyond this case.

The Voting Rights Act of 1965 does not empower the courts to subdivide a jurisdiction to ensure proportional representation. This principle of law was reinforced by the Court in *Gingles*, which requires Section 2 plaintiffs to establish a Section 2 violation before being entitled to relief.

In the case sub judice, the Eleventh Circuit has bypassed the legal principles and mandates established by the Court in *Gingles* and empowered the district court to

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[7] The fact that the Eleventh Circuit was not familiar with the factual presentation of the parties was shown at the oral argument of this case. There, the Honorable Peter T. Fay referred to the current commissioner as a "benevolent dictator" even though Respondents made no claim at trial that any commissioner had ever been unresponsive to the needs of minorities.

award Respondents the relief they seek even though the Respondents did not establish a Section 2 violation.

As this case was a reported decision, it is binding precedent in the Eleventh Circuit and will obviously be utilized within the circuit by other Section 2 plaintiffs to by-pass their burden of proof. Further, the decision will serve as persuasive authority in other circuits for Section 2 plaintiffs. This case will be precedent to empower district courts to expand and subdivide local governments. This will occur whether the claim is against one of the 19 counties in Georgia utilizing the sole commissioner form of government or whether it is a claim against any local form of government if it does not utilize a district system that gives rise to proportional representation. This was certainly not the intent of Congress. As noted by the Court in *Gingles*, the Senate Report accompanying the 1982 amendment clearly states "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation." 478 U.S. at 46.

X. CONCLUSION

For these reasons, Petitioners respectfully submit that the Eleventh Circuit decision is of such importance that it should be reviewed by the Court, and Petitioners respectfully request the Court to enter an order granting this petition for a writ of certiorari.

Respectfully submitted this 15th day of June, 1992.

R. Napier Murphy

§ 1973. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

Rev. E.K. HALL, Sr. et al., Plaintiffs,

v.

Jackie HOLDER, et al., Defendants.

Civ. A. No. 85-242-2-MAC (WDO).

United States District Court,
M.D. Georgia,
Macon Division.

March 7, 1991.

Five registered voters brought action contending that Bleckley County, Georgia's single county commissioner form of county government violated Constitution and Voting Rights Act. The District Court, Owens, Chief Judge, held that county's sole commissioner form of government did not violate either Constitution or Voting Rights Act.

Judgment for defendants.

Christopher Coates, Milledgeville, Ga., Laughlin McDonald, Neil Bradley, Atlanta, Ga., for plaintiffs.

R. Napier Murphey, Cubbedge Snow, Jr., Martin, Snow, Grant & Napier, Macon Ga., W. Lonnie Barlow, Arnold & Barlow, Cochran, Ga., for defendants Jackie Holder and Robert Johnson.

ORDER

OWENS, Chief Judge.

In this civil action plaintiffs contend that Bleckley County's single county commissioner form of county government, which was established when the county was

created in 1912 and has continued without change, violates the Constitution of the United States and Section 2 of the Voting Rights Act.[1]

Plaintiffs are six black Bleckley County registered voters and the Cochran/Bleckley County Chapter of the National Association for the Advancement of Colored People. Defendants are Commissioner Jackie Holder, the incumbent sole county commissioner, and Probate Judge Robert Johnson who also serves as superintendent of elections. O.C.G.A. § 21-2-70.

Plaintiffs contend that Bleckley County should have more than one county commissioner, that each commissioner should be elected from and by the voters of a single member district, and that the black population resides in a contiguous area so that a safe black single member district can be created to give black citizens the opportunity to participate in the electoral process and to elect one or more county commissioners of their choice.

Following extensive discovery, a non-jury hearing was held on December 4-7, 1989. Thereafter the hearing was transcribed and the parties in May, 1990, submitted

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[1] This civil action was originally filed on July 17, 1985, under the Constitution and the Voting Rights Act, 42 U.S.C. § 1973, challenging (1) the method of electing the members of the Cochran City Council, (2) the district voting plan for members of the Bleckley County Board of Education, and (3) the sole commissioner form of county government. Plaintiffs' claims against the City of Cochran and the Board of Education were settled and a consent order was entered, leaving just this claim to be resolved.

lengthy, detailed proposed findings of fact and conclusions of law. All having been considered, the following constitutes the court's findings of fact and conclusion of law. Rule 52(a) Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Bleckley County, one of Georgia's 159 counties, was created by an amendment to Georgia's constitution in 1912. Its territory came from what was then Pulaski County. The amendment provided for a county government of one elected county commissioner. 1912 Ga.Laws 38. The state legislature in 1913 implemented the amendment and appointed the county's first commissioner to serve until his successor was elected and qualified. 1913 Ga. Laws 345.

2. Bleckley County encompasses some 219 square miles and is situated in rural Middle Georgia about 40 miles southeast of Macon.

3. From its creation in 1912 until today, Bleckley County has never varied from its present form of county government – one elected county commissioner. The powers and duties of the county government, also referred to as "the governing authority," are as specified by general state law, see O.C.G.A. § 36-5-22.1, applicable to all 159 counties without regard to the number of county commissioners each county may have. Bleckley County's sole county commissioner thus exercises all the powers and duties of the governing authority of Bleckley County.

4. The sole county commissioner form of county government is not unique to Bleckley County. Some 20 other Georgia counties have sole county commissioner forms of county government. See *The Macon Telegraph and News*, July 6, 1990.

5. In addition to having only one county commissioner, Bleckley County also has only one Sheriff, Probate Judge, Clerk of Superior Court, Tax Commissioner, Coroner, School Superintendent, County Surveyor and Magistrate, each of whom is elected by all the voters of Bleckley County.

6. According to the 1980 Census of Population, Bleckley County's total population was 10,767, having the following characteristics:

(a) By Race	–	Total Population
Black	2,367	22%
White	8,297	77%
Other	103	1%
Total	10,767	100%

(b) By Race	–	Voting Age Population
Black	1,474	19%
White	6,175	80%
Other	70	1%
Total	7,719	100%

7. At the time Bleckley County was created in 1912 and 1913 very few blacks, if any, could vote. There was no evidence presented at trial to suggest that the specific act

of creating Bleckley County's single member commission belied a racial motivation on the part of the Georgia Legislature. The sole commissioner form of government was not specifically selected for the purpose of further depriving already deprived blacks of the opportunity to vote or participate in the political process. The evidence does not show why the legislature chose the sole commissioner form of government.

8. Until the Civil Rights Act of 1957, 1960, 1964 and 1968 were passed by Congress and enforced by federal authorities, Bleckley County, in common with state and local government throughout much of the United States, enforced racial segregation in all aspects of local government – courthouse, jails, public housing, governmental services – and deprived its black citizens of the opportunity to participate in local government. After the Civil Rights Acts, segregation ended and is today no longer imposed by government.

9. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1953) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1954) ordered an end to segregated public schools. From the 1950's until around 1970, there was great public debate and discussion of desegregation, not just of public schools but of all public places. Candidates for public office during those years appealed for voter support by promising to oppose desegregation, but that practice ceased in the mid to late 1960's in Georgia and Bleckley County.[2]

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[2] Plaintiff Walker, President of the Bleckley County NAACP, testified that he was unaware of any open racial appeals in recent elections in Bleckley County.

10. The 1980 census and the well-founded opinions of plaintiffs' experts, Dr. Willingham and Dr. Engstrom, show conclusively that more black than white residents of Bleckley County continue to endure a depressed socio-economic status. This conclusion is mandated by census data showing, among other things, that: (1) 50% of the whites in Bleckley County have a high school education while less than 15% of the blacks have a high school education; (2) whites are more likely than blacks to own automobiles and have telephones; (3) the per capita income and median family income of whites is double that of blacks; and (4) while one-third of the blacks live below the federally recognized poverty level, only 9% of the whites do. This depressed socio-economic status hinders the ability of blacks to participate in the Bleckley County political process because, as Dr. Willingham opined: (1) better educated people are less threatened by having to make choices and are more likely to understand the importance of civic involvement; and (2) less educated people are more difficult to mobilize to vote even if they are registered to do so.

11. The depressed socio-economic status of black residents, including particularly the lack of public or private transportation, telephones and self-employment, hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process.[3]

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[3] The barriers to active participation in the political process are today compounded by the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area.

12. Local government is not responsible for arranging engagements for candidates for public office to speak to or be exposed to the voters of Bleckley County and is, therefore, not the cause of candidates having or not having the opportunity to be exposed to the members of church, civic or social groups. Churches, civic clubs and other social groups in Bleckley County – as in most of the United States – are generally racially and/or sexually exclusive, not because of state or local government but as the result of the personal preferences of the membership.

13. Until the voting Rights Act of 1965 was passed by Congress, black citizens were virtually prohibited from registering to vote in Bleckley County. Before the 1965 Voting Rights Act, 3,346 of the 4,528 voting age Bleckley County whites were registered to vote, but only 45 of the 1,380 voting age non-whites were registered. Immediately after the Voting Rights Act of 1965 Act passed white registration increased from 3,346 to 4,756 and non-white increased 600% from 45 to 287. (Plaintiff Exhibit 388). Since then, black voter registration has steadily increased so that today about 70% of the black voting age population is registered to vote – about the same as for today's white voting age population. (Defendants Exhibits 10-19).

14. In 1984, for the first time, black deputy voting registrars were appointed in Bleckley County, and black citizens were permitted to register in places where blacks normally congregate, such as the black Masonic lodge.

15. From 1978 to 1986, the defendant probate judge as the superintendent of county elections appointed 224

poll managers for some 17 elections; all of those appointed were white persons. He also appointed 509 poll clerks, only 30 of whom were not white. The probate judge's failure to appoint more minorities as poll managers and clerks is the subject of an unresolved lawsuit in this court. *NAACP of Cochran/Bleckley County, et al. v. Bleckley County, et al.*, 88-32-MAC (WDO). The evidence does not show that this practice has deterred blacks from voting.

16. While the legislature of this state has never altered Bleckley County's sole commissioner form of county government, the legislature in 1985 did submit to the voters of Bleckley County by referendum the question of whether or not Bleckley County should have a county commission of six county commissioners. 1985 Ga. Laws 4406. So limited was the electorate's interest in the referendum that only 25% of the eligible voters expressed any opinion with regard to the desirability of the proposed change. By a vote of 1,156 to 887, the voters on November 4, 1986, voted against a six commissioner commission. The voters did not perceive the referendum to be a black versus white issue and the vote was not racially polarized.[4]

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[4] Councilman Willie Basby, a black citizen and the councilman from Cochran's majority black city council district, testified as follows:

> Q: Mr. Basby, were you familiar with the 1986 referendum in Bleckley County to change the form of government?

(Continued on following page)

17. Neither the direct nor the circumstantial evidence shows that the sole commissioner form of government has been retained from 1912 until today for any particular purpose, racial or otherwise. The evidence does not show that the 1986 referendum was authorized for racial reasons; rather, local citizens, dissatisfied with *ad valorem* tax increases authorized by the sole commissioner who has the responsibility of settling *ad valorem* tax rates, generated the political influence that caused the legislature to authorize the referendum.

18. The evidence does not show that the sole commission form of government for Bleckley County has been retained for tenuous reasons. Defendant's expert testified that the citizens of Bleckley County rejected the referendum and preferred the single member commission because it is less expensive and satisfactorily responsive to the county's small size and population. In a January 25, 1984, article from *The Cochran Journal*, Councilman Basby stated in reference to whether the county should abandon

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(Continued from previous page)

A: Right.

Q: Was there any black interest, so to speak, any organized interest in the black community in that referendum?

A: I think so, but it was on a – it was very small.

Q: Was there any organized effort in the black community with regard to that referendum to vote one way or the other, any meetings?

A: Yes, it was (sic), but it was a small percentage of participation.

(Transcript pp. 320-21).

the sole commissioner system, "[l]arger counties obviously need a commission, but one person could be good for small counties if he's an active man and deals with all the people." (Plaintiffs' Exhibit 41). Plaintiffs do not claim nor does the evidence show that defendant Holder or the county commissioner's office, as structured, are unresponsive to the particularized needs of the black community in Bleckley County.

19. Until the Georgia legislature in 1964 enacted a state election code uniformly proscribing how all primary and general elections held in this state were to be conducted, primary elections were conducted by state and local political parties pursuant to rules adopted by each state or local party and at times selected by each state or local party. Under this system in Bleckley County primary elections a plurality of all votes cast determined the winner in most years; in some years a majority of all votes cast determined the winner. Immediately before adoption of the election code, the state and county democratic committees adopted a majority vote requirement. At that time many officials of this state expressed great concern over an emerging black vote.[5]

20. The state election code of 1964 required a majority vote for all state and county elections in this state.[6] Because of this general requirement Bleckley County's

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[5] One such legislator, Floor Leader Frank Twitty, warned the Georgia House that without legislation district elections in Fulton County would inevitably lead to the election of a negro. (Plaintiffs' Exhibit 228).

[6] O.C.G.A. § 20-2-501.

sole commissioner, like all public officials, is elected by majority vote. Whether the state-wide majority vote requirement violates the Voting Rights Act, any other law or the Constitution is the subject of a lawsuit pending in the Northern District of Georgia.

21. No black candidate has ever run in a primary or general election for sole commissioner of Bleckley County.

22. The evidence does not show that any candidate slating process exists in Bleckley County.

23. Prior to the election of school board members from single member districts and the election in 1986 of Reverend Hall, a black who ran against a black in a majority black district, only one black had ever run for a county-wide office – in 1984 Reverend Hall unsuccessfully opposed incumbent Robert Johnson for probate judge.

24. If the county commission were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority "safe" district – the same district Reverend Hall was elected from – would result.

25. Neither the plaintiffs nor the defendants produced data showing a relationship between the race of Bleckley County voters – white or black – in election contests for county offices and the way in which the voters voted; such data is simply not available. Instead, they each rely upon the success and/or failure of white

and black candidates in attracting the votes of Bleckley County voters in other than county office elections.

Lester Maddox, an avowed racist, ran for governor in 1964 as a Democrat against Republican Howard H. "Bo" Callaway. Bleckley countians voted 1,906 for Maddox, 870 for Callaway and 25 write-ins for Arnall. In 1974, J.B. Stoner, also an avowed white racist, ran for Lt. Governor in the state-wide Democratic primary election and in Bleckley County got around 20% of the total county vote compared to 9% of the total state vote. The evidence does not show how many whites or blacks voted for Mr. Stoner or Mr. Maddox.

In 1984, when Bleckley County had eight election precincts, Jesse Jackson ran in the Democratic presidential preference primary. In Bleckley County and statewide, the results were:[7]

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[7] See Court Exhibit 1, Secretary of State's Election Report.

DEMOCRATIC PRESIDENTIAL PREFERENCE PRIMARY

Candidate:	Bleckley County Vote:		State Vote:	
Askew	1	.05%	1,660	.24%
Cranston	4	.24	923	.13
Glenn	324	19.30	122,744	17.93
Hart	529	31.60	186,903	27.30
Hollings	19	1.14	3,800	.56
Jackson	150	8.90	143,730	21.00
McGovern	46	2.80	11,321	1.65
Mondale	583	34.80	208,588	30.47
Willis	6	.36	1,804	.26
Uncommitted	9	.54	3,068	.45
Total	1,671		Total 684,541	

REPUBLICAN PRESIDENTIAL PREFERENCE PRIMARY

Reagan	87	50,793

A homogeneous precinct and bivarate regression analysis of the 1984 presidential preference primary election in Bleckley County shows that Jesse Jackson received some 60.8% of the black vote and some 0.9% of the white vote.

In 1984, there were 958 registered black voters and 4,549 registered white voters in Bleckley County. In addition, there were 140 registered voters of other races. The evidence does not show why only 1,671 of the 5,647 registered voters went to the polls.

Reverend Jackson again ran in the 1988 Presidential Preference Primary. In the interim between 1984 and 1988 Bleckley County elections were consolidated into one voting precinct. A regression analysis of the type conducted with regard to the 1984 election was no longer possible. However, the court takes judicial notice of the official election results offered by neither plaintiffs nor defendants which show the following breakdown of votes case [sic] in that primary:[8]

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[8] See Court Exhibit 2, Secretary of State's Election Report.

DEMOCRATIC PRESIDENTIAL PREFERENCE PRIMARY

Candidate:	Bleckley County Vote:		State Vote:	
Babbitt	28	1.58%	3,247	0.52%
Dukasis	210	11.82	97,179	15.61
Gephardt	202	11.37	41,489	6.66
Gore	933	52.50	201,490	32.36
Hart	109	6.13	15,852	2.55
Jackson	250	14.07	247,831	39.80
Simon	13	0.73	8,388	1.35
Uncommitted	32	1.80	7,276	1.17
Total	1,777		Total 622,752	

REPUBLICAN PRESIDENTIAL PREFERENCE PRIMARY

Bush	345	44.06%	215,516	53.75%
Dole	245	31.29	94,749	23.63
DuPont	2	0.26	1,309	0.33
Haig	3	0.38	782	0.20
Kemp	47	6.00	23,409	5.84
Robertson	141	18.01	65,163	16.25
Total	783		Total 400,928	

In 1988, there were 4,225 registered white voters and 1,024 registered black voters in Bleckley County.

In 1988, an exit poll was conducted at the direction of plaintiffs' expert, Dr. Willingham at Bleckley County's sole voting precinct.[9] The poll, labelled a "sample ballot," unlike the actual ballots used in the primary simply listed the slated candidates for president from *both* political parties.[10] In addition to a section which identified the Southern Regional Council, of which Dr. Willingham was a member, as an independent group taking the poll and instructions on how to fill out the sample ballot, the sample ballot included the following question:

VOTER SURVEY

Please check or mark the appropriate boxes below and fill in the blank space.

Race: ○ White ○ Black

Sex: ○ Male ○ Female

_____ years old.

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[9] Dr. Willingham was not present at the polling place, and so was unable to answer from personal knowledge defense counsel's questions with regard to whether the exit poll was executed based upon random sampling techniques and as to what approach was used by those distributing the poll.

[10] The court also notes that despite the fact that the sample ballot listed the names of the presidential candidates, it instructed voters "Please check or mark the names of those for whom you voted in the regular *Mayor/Council election* on the sample ballot." (Plaintiffs' Exhibit 390) (emphasis added).

Do you believe voters tend to vote along racial lines in Bleckley County elections?

O Yes O No

(Plaintiffs' Exhibit 390).[11] The exit poll was supervised by Miss Chris Carrea, who did not testify at the trial.

Dr. Willingham testified that pollsters were instructed to attempt to distribute the sample ballots to as many voters as they could. According to Plaintiffs' document "Results of the Exit Poll at a Glance," (Plaintiffs' Exhibit 390), 993 voters responded to the poll; their preferences broken down as follows:

REPUBLICANS

George Bush	119
Bob Dole	86
Pete du Pont	1
Alexander M. Haig	0
Jack Kemp	19
Pat Robertson	68

[11] The parties do not reference this portion of the exit poll in their respective briefs and the court gives no credence to any evidence which might have been drawn from a question eliciting a legal opinion from Bleckley County voters.

DEMOCRATS

Bruce Babbitt	3
Michael Dukakis	81
Dick Gephardt	51
Albert Gore	319
Gary Hart	39
Jesse Jackson	161
Paul Simon	2
Uncommitted Preference	12
Declined to Answer	20
Marked Two Candidates	12[12]

The exhibit also includes a breakdown of expressed preferences by voter race. Of the 161 voters preferring Jesse Jackson, 145 were black, 11 were white, and 5 were of a race other than black or white. In sum, of those who expressed a preference, 1.3% of whites, 92.3% of blacks, and 17.8% of other races supported Jesse Jackson.

In 1988, all voters voted in one precinct in Bleckley County. In the absence of muiti-precinct data a bivarate regression analysis could not be performed. The exit poll, however, does indicate that Jesse Jackson was again the

[12] The "uncommitted preference" was one of the choices on the sample ballot; plaintiffs listed these responses separate from those who simply refused to fill out a sample ballot. The court also notes that the exhibit which plaintiffs' counsel identified as the breakdown for votes county-wide is headed "(Cochran)." Because the votes set out on this exhibit equal the total number of voters responding, 993, the court assumes that this document, indeed, reflects exit poll responses for all of Bleckley County's voters who responded.

choice of most black Bleckley County voters and not the choice of most white voters.

The City of Cochran is in Bleckley County. In 1980, it had 5,121 residents of whom 1,704 were black (33%). Until 1986 and the division of the city into single member districts, one of which was 73% black, only one black – Willie Basby – had been elected at-large by plurality vote of the voters of Cochran. Other blacks – David Walker and Mattie McDonald – ran at-large for city council and lost.

Basby attracted the following votes against the following white candidates:

1972	Crooms (W)	688
	Basby (B)	439-Lost
1973	Dixon (W)	249
	Lucas (W)	177
	Basby (B)	277-Won
1975	Greer (W)	405
	Basby (B)	379-Lost
1977	Giddings (W)	403
	Tomberlin (W)	55
	Basby (B)	467-Won
1979	Justice (W)	228
	Basby (B)	521-Won

1981 to date – Basby – unopposed

Judge Benham, an incumbent black Georgia Court of Appeals judge, carried Bleckley County in a recent election. In past elections other black candidates – C.B. King in 1972; Mildred Glover in 1982; and, Otis Smith in 1988 –

for state-wide offices received very few votes in both Bleckley County and state-wide.

After the City was divided into single member districts, Reverend Roberson, a black citizen, ran for city council against a white opponent. In the district there are some 300 white (27%) and 800 black (73%) registered voters. Reverend Roberson won 492 (84%) to 96 (16%).

26. No credible evidence was available to estimate support for most of these candidates from the black and white communities, respectively. From these facts it is apparent that from time to time black and white voters prefer different candidates, but the evidence is insufficient to demonstrate and this court cannot find that there is a consistent relationship between the race of Bleckley County voters and the way – for whom – they vote.

The opinions of the experts to the contrary not accepted. They are based upon insufficient data and upon their preconceived notions that voters in Bleckley County, like voters all over this Nation, when presented with black and white candidates choose a candidate of their own race. (Tr. pp. 384, 434).

DISCUSSION

Section 2 of the Voting Rights Act of 1965, as amended June 29, 1982 ("the Act"), 42 U.S.C. § 1973, *et seq.*, affords a remedy to plaintiffs who successfully demonstrate an inequality traceable to a particular law, practice, or structure based either upon a discriminatory intent in its original or continued implementation or upon proof that the law, practice, or structure results in

denial or abridgment of any member of a protected class' right to vote. *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S.Ct. 2752, 2762, 92 L.Ed.2d 25, 42 (1986). The Act provides in part:

> (b) A violation of [the Act] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of the protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

The court will first address plaintiffs' claims arguing that the single county commissioner form of government was enacted and has been maintained in Bleckley County with the intent to preclude members of the black community from enjoying equal access to the political process. The court will then analyze the relevant evidence with regard to whether Bleckley County's single commissioner form of government does, in fact, result in an abridgment to equal participation by the black community.

I. CONSTITUTIONAL CHALLENGE

This court first notes that even those cases which have led to the development of the discriminatory results test and those employing the results analysis, addressed *infra*, have drawn upon a wealth of evidence of past discrimination as well as evidence of electoral returns which demonstrated that the challenged practice or procedure worked to perpetuate past discrimination. Plaintiffs' suggestion that Georgia politics has seen the rise and fall of many racist politicians without more cannot amount to evidence that a particular enactment is tainted with racial animus. *See Vereen v. Ben Hill County*, 743 F.Supp. 864, 869 (M.D.Ga.1990) (citing *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S.Ct. 1916, 1922, 85 L.Ed.2d 222, 231 (1985)). To prevail upon its specific claims that the single member county commission was enacted or has been maintained based upon an intent to exclude or limit the influence of the black community, plaintiffs must present the court with greater evidence than conglomeration of newspaper clippings from Georgia newspapers and local resident reminiscences of this state's struggle to cast off the bonds of segregation. Plaintiffs must present credible evidence either that the Georgia Legislature had a discriminatory purpose in creating Bleckley County's single member commission or credible evidence that the single member commission has been maintained to effectuate a discriminatory purpose. This they have not done.

Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1550 (11th Cir.1987), *cert. denied sub nom., Duncan v. Carrollton*, 485 U.S. 936, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988), provides an example of the type of evidence required to

demonstrate a racial motivation behind a particular enactment. In *Stallings*, the Eleventh Circuit emphasized the importance of the plaintiffs' historical evidence that defendant Carroll County had in 1947 sought to *re-establish* a one person commission. Representative Willis Smith of Carroll County, in a speech to the Georgia Assembly favoring the reinstatement of single member commission in Carroll County, stated:

> Georgia is in trouble with the Negroes unless this bill is passed. This is white man's country and we must keep it that way.

Stallings, 829 F.2d at 1551.

There is no evidence in the record to demonstrate that the creation of Bleckley County or its single member commission in 1912-13 stemmed from a racial or discriminatory motivation. Unlike Carroll County in *Stallings*, Bleckley County's single member commission has been the exclusive form of government since the county's inception. Plaintiffs have put forward neither evidence of lobbying of the type found in *Stallings*, nor any similar evidence in support of a claim that the creation or maintenance of the single member commission in Bleckley County evidences intend [sic] to discriminate. The charter of Bleckley County and the creation of its single member commission were not proven to be the product of a specific, or even general, racial motivation.

Plaintiff's expert, Dr. McCrary, testified that in his research pertaining to the years 1946-1964 he found no articulation of a racial purpose for the maintenance of the sole commissioner form of government in Bleckley County. The court finds this particularly significant given

the wealth of evidence presented by plaintiffs which suggests that racial views and motives, where felt, were topics of open expression during this time period. The open expression of racist sentiments was reflected in various newspaper articles such as *Valdosta Daily Times* articles quoting various legislators in 1962.[13] Whether or not the system in Bleckley County was maintained for such a purpose or not is a matter of the purist speculation. Without specific evidence that the system was maintained to effectuate an intent to dilute minority participation, plaintiffs' claim must necessarily fail.

At trial, the only evidence with regard to more recent elections and politics in Bleckley County addressed the lack of open racial issues or appeals in those elections and the 1986 referendum on the proposal to abdicate the single member commission.[14] The 1986 referendum was rejected and the single member commission retained by a majority of the votes cast (the vote was 1,156 to 887). 1987 Ga.Laws CCLXXII. So limited was the electorate's interest in altering the commission's structure, that only approximately 25% of the eligible voters expressed any opinion with regard to the desirability of the proposed change. The Bleckley County Grand Jury recommended the referendum because of dissatisfaction in the county with a

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[13] *See, e.g.*, n. 5, *supra*.

[14] *See* n. 2, *supra*. The exception, of course, would be the presidential campaign of the Reverend Jesse Jackson. *See* n. 29, *infra*.

recent tax increase. Defendant's expert, Dr. Loftin, testified that in her personal opinion, as a historian and resident of Bleckley County since 1969, the citizens of Bleckley County rejected the referendum and preferred the single member commission because it is less expensive and satisfactorily responsive to the county's small size and population.[15]

The testimony of Councilman Basby at trial further demonstrates that others in the black community, when presented with an opportunity to express an opinion on the proposed change in the commission size, may have shared his sentiments. *See* n. 3, *supra*. While the overall disinterest in the referendum is not grounds to disregard plaintiffs' arguments favoring an enlarged commission, the limited response and Councilman Basby's opinions do suggest a variety of viewpoints within the black community with regard to the attractiveness of a multi-member commission.

The underwhelming response of Bleckley County voters to the referendum coupled with the lack of evidence from either plaintiffs or defendants to demonstrate that race played even a minor role in the referendum campaign indicates a general perception in the community that the referendum results were the product, not of racial motivations, but of a generally held perception favoring a vote against expanding the size of the government: a sentiment which knows no racial barriers. This court has heard no credible evidence to support plaintiffs' arguments that the referendum itself evidences the

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[15] See FACTS, ¶18, *supra*.

alleged discriminatory purpose to maintain the county commission in its present form.

Plaintiffs also complain that the majority vote requirement used in Georgia to govern primary elections was implemented and has been maintained for the purpose of diluting minority voting. There was no evidence presented at trial to suggest that Bleckley County exercised any control over the implementation of the majority vote requirement. Again, the issue of whether the statewide majority vote requirement violates the Voting Rights Act, any other law or the Constitution is the subject of the above referenced case in the Northern District of Georgia. This issue is not properly before the court in the case *sub judice*.

The evidence presented at trial and history demonstrate that no county has ever itself exercised control over the electoral process. County elections have long been subject to the whims and control of the Georgia Legislature. *See, e.g., Vereen*, 743 F.Supp. at 866-67, n. 4 (1872 Georgia Legislature, concerned about black gains in political power, simply abolished elections for county commissioner in majority black McIntosh County). The term "maintenance" suggests a power to dismantle if the authorized body so chooses; in the case *sub judice*, Bleckley County had neither the power nor the authority to alter the majority vote requirement. Whether or not the county might have been inclined to abandon the system or tacitly approved of it is a matter of speculation and has no bearing upon the plaintiffs' claims.

While the facts that racism and segregation are part of the history of the South and the nation, and that these

are problems yet subject to full redress nationwide, are not matters subject to quibbling, this court cannot, based simply upon the existence of racial tensions in this country, charge every piece of legislation and every political process carried out with being specifically tainted by discriminatory intent. Plaintiffs in the case *sub judice* have failed to provide any evidence that Bleckley County's single member county commission is the product of original or continued racial animus or discriminatory intent.

II. DISCRIMINATORY RESULTS

The essence of a vote dilution claim such as the one remaining before the court is that the identified electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25, 44 (1986).[16]

In *Gingles*, the Supreme Court set forth the manner in which a trial court should evaluate a § 2 results claim. The Court set out both the analysis formulated by Congress and a new three part test for analyzing vote dilution claims under Section 2 of the Act. *Gingles*, 478 U.S. at 37-38, 48-51, 106 S.Ct. at 2759, 2765-67; *see also Stallings*, 829 F.2d at 1550 (the *Gingles* test focuses on the existence

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[16] The intent test of the Act is concentric with the analysis of the Constitutional grounds for recovery asserted by plaintiffs. It is the unconstitutional motivation in enacting or maintaining the system which amounts to a violation. Evidence of racial intent has been considered as one complete analysis, *supra*.

of a politically cohesive geographically insular minority group and voting along racial lines as necessary preconditions to successful voting impairment claims).[17] The necessary preconditions are:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;[18]
>
> Second, the minority group must be able to show that it is politically cohesive; and[19]
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently – in the absence of special circumstances, such as the minority candidate running unopposed, . . . – usually to defeat the minority's preferred candidate.

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[17] The *Stallings* case is, again, of particular interest to this court as it involved a challenge to Carroll County's single member commission form of government.

[18] In the case *sub judice* plaintiffs argue that if the existing single member commission were enlarged to three or more members, each representing a separate district, the black community is sufficiently geographically compact to constitute a majority in such a district.

[19] The similarities between racial bloc voting and this second tier of analysis can be seen in the *Stallings* court's statement in dicta that "proof of racial polarization may, of course, be found sufficient by this Court to make the necessary finding of cohesiveness." *Stallings*, 829 F.2d at 1563; *But see Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, 906 F.2d 524, 526-27 (11th Cir.1990) (despite proof of bloc voting by whites, class failed to prove political cohesiveness of black and hispanic voters in jurisdiction).

Gingles, 478 U.S. at 48-51, 106 S.Ct. at 2765-67 (*citing* Blacksher & Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden*, 34 Hastings Law Journal 1 (1982)).

Senate opponents to the 1982 amendment to the Act expressed fears that a change in the Voting Rights legislation would lead to "a requirement of racial quotas, or an all-out assault on at-large election systems in general." S.Rep. 97-417 at 27, U.S.Code Cong. & Admin.News 1982, pp. 177, 205. To insure that this result did not obtain, the Act includes the following language:

> *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b). As an additional barrier to unattractive, mechanical results such as quotas, the Senate left to the trial court the latitude to consider a variety of factors. S.Rep. at 28.[20] The Senate Committee specifically stated:

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[20] The Senate Report lists the "typical" factors to be considered as follows:

"1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register to vote, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for

(Continued on following page)

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used as a mechanical 'point counting' device . . . Rather, the provision requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case . . .

(Continued from previous page)

discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction." S.Rep. No. 417 at 28-29, U.S.Code Cong. & Admin.News 1982, pp. 206, 207.

The Senate Report also lists the following as additional relevant factors:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.*

Id. at 29 n. 118,[21] U.S.Code Cong. & Admin. News 1982, p. 207 n. 118.

Section 2 protects the right of minority voters to be free from election practices which deny them the *same* opportunity to participate in the political process as other citizens enjoy, S.Rep. at 28 (emphasis added); it does not mandate proportional percentage representation by race. Obviously, then, a successful claim is contingent upon evidence that it is, indeed, the practice to which an objection is raised that works to deny minorities that equal access. "The ultimate determination of vote dilution is a question of fact to be resolved under the totality of the circumstances." *Solomon,* 899 F.2d at 1015-16, n. 6. (Kravitch, concurring specially) (*citing Gingles,* 478 U.S. at 79,

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[21] *See also Solomon v. Liberty County,* 899 F.2d 1012, 1033 (Tjoflat, specially concurring) ("[T]he primary objection in the Subcommittee on the Constitution to the House bill was the perceived lack of a threshold requirement to the results test. Without such a requirement, the Subcommittee members feared, a plaintiff could mechanically prove one objective factor and win under the new language, not leaving the defendant any opportunity to rebut the plaintiffs' case") (*citing* Subcomm. on the Constitution to the Senate Comm. on the Judiciary, Voting Rights Act: Report of the Subcommittee on the Constitution, *appended to* S.Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code & Admin.News 278, 309).

This court is mindful that in cases where a plaintiff can show that an electoral scheme was purposefully adopted or maintained to weaken a minority group's political influence, a test less stringent than *Gingles* might apply. *See Solomon,* 899 F.2d at 1017, n.5 (Kravitch, specially concurring). Given this court's determination that plaintiffs have failed to demonstrate discriminatory intent, any such less stringent test need not be considered here.

106 S.Ct. at 2781). The *Gingles* test and the Senate Factors from which it was drawn ensure that a successful vote dilution claim must be based upon nothing less than evidence that, because of its submergence in a predominately white district, a geographically compact, politically unified minority electorate's choices at the polls are impeded and defeated by the voting scheme. *Stallings,* 829 F.2d at 1563; *Gingles,* 478 U.S. at 51, 106 S.Ct. at 2766-67.

A. Applying the *Gingles* Test

1) Racial Bloc Voting

The plaintiffs do not present evidence of local office elections where black candidates or candidates harnessing the support of the black community suffered defeat attributable to the votes cast by a white or majority voting bloc. The present claim is not based upon statistical evidence of polarized voting in elections for local office.[22] In fact, the most pronounced evidence *offered by plaintiffs* with regard to a local election involving at-large voting amounts to an electoral anthology of the triumphs of Cochran City Councilman Willie Basby ("Councilman

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[22] The court does note the plaintiffs' contention that the county's decision to consolidate the separate voting precincts into one county-wide voting precinct has resulted in difficulty in analyzing the racial composition of voting in the county. The court does not mean to suggest that plaintiffs have failed to present all available evidence, the court simply argues with plaintiffs' expert, Dr. Willingham, that this case involves a "paucity of statistical information regarding racial bloc voting" in Bleckley County. (Transcript p. 357).

Basby"), a black citizen appearing as a witness for the plaintiffs.

Plaintiffs state that given the racial demographics of Bleckley County, "it would be necessary for a candidate, whether he or she be black or white, who is supported by black voters to receive substantial white voter support in order to win a sole commissioner race." (Plaintiffs' Proposed Findings of Fact ¶16). Indeed, Councilman Basby stated:

> " . . . a small town in Georgia (Cochran), you have to be known by blacks and whites to get elected for public office; therefore, you need a percentage of all black and white to get elected." (Transcript p. 312)[23]

Basby, a veteran of local elections dating back to the early 1970's, went on to say that personal contact is the most important aspect of running for elections in Cochran and Bleckley County. (Transcript pp. 312-13).

It appears that the testimony of Councilman Basby serves less as evidence of racially polarized voting and more as a lesson in the dynamics of grass roots political campaigning. Nothing in the plaintiffs' evidence drawn

[23] The court takes into account Councilman Basby's further statement "in the City of Cochran has began to work better, but now, when you're talking about at-large in the County election, it's different because you got more people to deal with." (Transcript p. 320).

from elections for local office leads this court to a conclusion that voting on local levels is racially polarized.[24]

Exogenous Elections

Plaintiffs, conceding that Reverend Hall is the only black candidate to have run for county office, premise their arguments that racial bloc voting infects the electoral process in Bleckley County upon evidence drawn principally from statistical analysis of the 1984 and 1988 Democratic Presidential Primaries, specifically the campaigns of the Reverend Jesse Jackson, and an exit poll conducted during the 1988 election.

Of course, the fact that plaintiffs' evidence in this area relates only to exogenous elections does not doom their case. *See Gingles*, 478 U.S. at 57 n. 25, 106 S.Ct. at 2770 n. 25 ("Where a minority group has never been able to sponsor a candidate, plaintiffs could rely on other

[24] The court does not mean to imply that it considers the track record of Councilman Basby as rebuttal evidence against a showing that blacks have not fared well in elections in Bleckley County. This would be improper as these elections did not involve the same countywide electorate involved in the commissioner elections. *Stallings* 829 F.2d at 1560 ("The district court's reliance on municipal elections in [the county] as proof of minority electoral success of a county electoral scheme is obviously misplaced"). The court does note, however, that in a case characterized by a paucity of evidence derived from local elections, the plaintiffs themselves offer a witness who has enjoyed electoral success despite white opponents in those elections, city elections requiring only a plurality for election. The court also takes note of the city council elections in which other black candidates did not fare so well, i.e., plaintiff Harris (1977), plaintiff Hall (1978), etc.

factors that tend to prove unequal access to the electoral process"); *see also Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1209 n. 8 (5th Cir.1989) ("[P]laintiffs may not be denied relief simply because the absence of black candidates has created a sparsity of data on racially polarized voting in purely indigenous elections.") The *Gingles* Court envisioned circumstances where a trial court would be called upon to engage in analysis beyond mere observation of the statistical data compiled from local office elections.

Prior to the *Gingles* decision, the Eleventh Circuit, in applying the Senate factors, specifically held that the fact that no black has run for the particular office does not *per se* weaken a claim under the Act. *See McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir.1984) (court noted that the lack of a black candidate may be the result of a racially discriminatory system); *Accord Westwego*, 872 F.2d at 1209-10 (court specifically validated the use of statistical data from the 1984 Jesse Jackson campaign, in addition to local election returns, as a "local appraisal" to establish some degree of racial bloc voting); *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) ("Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections [the office subject to the plaintiffs' challenge], the district court properly considered them *as additional evidence of bloc voting* – particularly in light of the sparsity of available data") (emphasis added).[25] To the extent that

[25] the court notes that in *Westwego*, the Louisiana district court, like the court in *Gretna*, was presented with evidence from the Jesse Jackson campaign *in addition to* evidence drawn from local elections involving black candidates in parish-wide elections. *See Westwego*, 872 F.2d at 1209.

such evidence is established and properly presented, plaintiffs may rely upon evidence drawn from elections other than those for the office in question or those limited to the local jurisdiction alone, as evidence that elections in the jurisdiction evidence racially polarized voting.[26]

The evidence presented in the case *sub judice* with regard to the Jesse Jackson campaigns was delivered through experts and their respective contradictory opinions as to what, if anything, the available statistical analyses revealed about Bleckley County Voters. Dr. Willingham, plaintiffs' expert, himself noted that the electoral evidence in the case *sub judice* is not ideal in scope or magnitude. He stated:

> Ordinarily, one would have had as one's resource statistical information or at least voting data which could then have been subjected to statistical analysis which would have resulted in objective statistical measures of racial bloc voting. That is present in this county that only one – in only one instance and that's the instance of 1984 where there was both the black candidate running countywide and a series of precincts.

[26] The court does find it curious, given the *Gingles* requirement that "the minority must be able to demonstrate that the white majority votes sufficiently – in the absence of special circumstances, such as the minority candidate running unopposed, . . . – *usually* to defeat the minority's preferred candidate." *Gingles*, at 48-51, 106 S.Ct. at 2765-67, 92 L.Ed.2d at 45-47 (emphasis added), that plaintiffs offer evidence drawn primarily from only two isolated elections for an office centered outside of Bleckley County, specifically evidence from the 1984 and 1988 Presidential Primaries, as evidence of racially polarized voting in Bleckley County.

> And for that, racial regression analysis is possible. There is no other election that fits the – that matches those conditions and for the reason, *a key way of explaining and talking about racial bloc voting was not available to the court in this particular case.*

(Transcript, pp. 375-76) (emphasis added).[27] Not surprisingly, this is one area where defendants' expert shares the views of those put on by the plaintiffs. In pointing out that endogenous elections are a preferable source of evidence, Dr. Wildgen stated, "[a]s one moves out from the challenged mechanism itself . . . there is a scientific and an obvious logical requirement to establish some plausible connection between what happens in one office and how it might bear on what happens in a second office." (Transcript p. 678).

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[27] Dr. Engstrom conducted the ecological regression analysis upon Bleckley County returns in the 1984 presidential primary. He, too, agreed that exogenous elections are not the ideal source for an expert to analyze.

> Q: Do you agree that exogenous elections, such as this race (the 1984 presidential primary), are less probative of the question of vote dilution in the challenged election system?
>
> A: Oh, I would prefer to have contests in the challenged election system involving choices between black and white candidates, yes.

(Tr. 472-73). *See also Citizens for a Better Gretna v. Gretna*, 636 F.Supp. 1113, 1126 (E.D.La. 1986) *aff'd* 834 F.2d 496 (5th Cir.1987) *cert. denied* 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (Dr. Engstrom, as plaintiffs' expert, conducted analysis of 1984 Jackson campaign, but also analyzed evidence from a statewide race for Secretary of State as well as two elections for the challenged office itself).

Despite the fact that it is called upon to analyze data and evidence drawn by plaintiffs from sources other than returns from elections for local office, as stated above, this court does not read the law in this area to allow defendants the opportunity to explain the electoral motivations underlying this broader range of evidence. Consistent with *Collins*, this court does not and will not seek to look behind the bare evidence to "ask why those votes were cast the way they were nor whether there were other factors present in contested elections, such as 'white backlash.' " *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935-936 (4th Cir.1987); *see also Stallings*, 829 F.2d at 1557-59 (defendants may not rebut plaintiffs' prima facie case of racial bloc voting with evidence of causation or intent).

Unification of the minority electorate was the hallmark of Reverend Jackson's "Rainbow Coalition" in the 1984 and 1988 Presidential Elections. Reverend Jackson's message depended upon an active, involved, cohesive minority electorate.[28] While theGcases [sic] stating that

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[28] The testimony of plaintiffs' expert, Dr. Willingham was as follows:

> Q: Mr. Willingham, I believe you wrote an article which was published in *Southern Politics* called *"Voter Participation is Now the Challenge,"* is that correct?
>
> A: Sounds like something I'd write.
>
> Q: You expressed in your article your opinion that the Jesse Jackson campaigns placed heavy emphasis on race in its (sic) mobilization drives, and you would agree with that today, wouldn't you?
>
> A: Yes, I would. (Transcript pp. 394-95).

the existence of racially polarized voting establishes the cohesiveness of the minority group are legion, *see, e.g., Collins* 816 F.2d at 935, the Jesse Jackson campaigns may actually represent situations where the conscious unification of the minority community may have actually created the perception of bloc voting by the majority.[29] In essence, the progression is reversed; the mobilization of a cohesive minority electorate may work to create the perception of the existence of racially polarized voting.[30]

The 1984 Presidential Preference Primary

Dr. Engstrom testified that the regression analysis, conducted with regard to the 1984 Jesse Jackson campaign returns in Bleckley County, related observations of two variables: the percentage of voters signing in who

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[29] Consider the testimony of defendants' expert, Dr. John Wildgen.

> "Q: In 1984, did Jesse Jackson do well among black voters across the country?
>
> A: Yes.
>
> Q: Did he do well in areas that, in your opinion, were not otherwise racially polarized?
>
> A: Yes. As far as I know, on a nationwide basis, Jesse Jackson attracted an appreciable amount of the black vote . . . " (Transcript pp. 683-84).

[30] The political campaigns of the Reverend Jackson may in reality yield aberrant information if one seeks to determine sustained voting patterns in Bleckley County or in any other jurisdiction for that matter. *See Gretna,* 834 F.2d at 502.

were black and the percentage of voters signing who voted for Reverend Jackson. Through the use of a "scattergram" or "scattered plot," Dr. Engstrom testified that he conducted a weighted regression which, according to Dr. Engstrom, demonstrated that the higher the black presence in a precinct the higher the percentage of votes cast for Jesse Jackson.[31] A homogeneous precinct analysis, or analysis of the precincts with 90% or more white voters, also revealed that Jesse Jackson received the fewest votes of any candidate in those precincts.

Dr. Engstrom estimated Reverend Jackson's support among black voters to be 60.8%; among white voters Reverend Jackson carried just an estimated 0.9% of the votes cast. His estimates, drawn from the regression, were virtually identical to the *CBS News/New York Times* exit poll for Georgia which estimated that Reverend Jackson received 61% of black votes and 1% of the white vote statewide. The regression analysis demonstrates that white and black voters did not agree upon whom the democratic party should nominate. Jesse Jackson enjoyed the electoral support of a majority of black voters; very few white voters supported Jesse Jackson.

The 1988 Presidential Preference Primary

Drs. Willingham and Engstrom both concluded from their research and analysis that the results of the 1988

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[31] Defendants point out that Dr. Engstrom's testimony and analysis did not include analysis of the margin for error in order to support his conclusion with regard to the estimates as to a proportional increase between black voter percentage and black voter support.

presidential primaries revealed that voting in Bleckley County is racially polarized. Neither Defendants nor their expert agree with that conclusion.

Dr. Wildgen first levelled his criticisms at the method employed or, more appropriately, at the absence of any identifiable method used in implementing the voting poll. He suggests that Dr. Willingham's study diverged from standard practices in exit polls. Rather than attempting to distribute sample ballots to every voter, Dr. Wildgen suggests that a proper "poll" would be contrived upon notions of eliciting responses to a sample ballot that was the mirror image of the actual presidential preference ballot. Dr. Willingham's study was more akin to a census. However, by Dr. Willingham's own testimony, the ballot, unlike a census, was not distributed to all of the voters, nor did all or even a majority of the voters respond. Dr. Wildgen concluded, "so what we have here is a sort of half-breed collection of information that is not amenable to either census type analysis or to statistical analysis." (Transcript p. 691).

The actual results of the 1988 presidential preference primary were again as follows:

REPUBLICANS

George Bush	345
Bob Dole	245
Pete du Pont	2
Alexander M. Haig	3
Jack Kemp	47
Pat Robertson	141

DEMOCRATS

Bruce Babbitt	28
Michael Dukakis	210
Dick Gephardt	202
Albert Gore	933
Gary Hart	109
Jesse Jackson	250
Paul Simon	13
Uncommitted Preference	32[32]

A quick comparison of these results with the results projected by Dr. Willingham's poll reveals some interesting points. Using a poll that reached 993 voters, or 37.9% of the total number of voters casting ballots, Dr. Willingham sought to accurately estimate the breakdown of voter support by race. The evidence indicates that his poll failed to achieve this goal.

Were the poll truly representative of the votes actually cast there would logically be some consistency between the responses to the poll and the actual returns.[33] Yet, it is clear that the results of the poll were unrepresentatively skewed. When one compares the preferences expressed in the poll with those actually expressed in the election, it becomes evident that the poll overemphasized the electoral support received by some

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[32] The total number of Bleckley county residents voting was 2620 out of 5,327 registered voters.

[33] Dr. Willingham testified that there was no random sample technique used nor was there advance planning for a margin of error in the poll. (Transcript p. 401-02). Rather the naked results of the survey were intended as a reflection of the actual support distribution in the election.

candidates, most importantly Reverend Jackson, and underestimated the support harnessed by other candidates.

For example, 16.2% of those voters reached by the poll supported Jesse Jackson.[34] Using this percentage figure, one would expect that around 16% of the actual votes cast would support this candidate, or approximately 420 votes. However, of the 2,620 votes cast, Reverend Jackson received only 250 votes, or 9.5% of the total votes cast.[35] Plaintiffs themselves suggest that the pollsters apparently attracted a disproportionately high number of Jesse Jackson supporters. (*See* "Plaintiffs' Response to Defendants' Proposed Findings of Fact and Conclusions of Law," ¶ 6, p. 7).[36]

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[34] This percentage figure is actually lower than Jesse Jackson's actual poll support compared to all those actually expressing a preference for one candidate or marking the uncommitted preference (the only options available on the actual ballots); compared to those numbers, the poll placed Jesse Jackson's support at 16.75%. Use of the 16.75% figure would, however, only serve to further overemphasize the support received by Jesse Jackson.

[35] The court notes that the percentage of voter support is normally calculated with respect to other candidates within one's particular party. Here, in terms of actual voter returns, Jesse Jackson received 14.07% of Bleckley County votes cast on the Democratic party side. Dr. Willingham's poll would put 24.1% of the democratic vote behind Jesse Jackson.

[36] This point becomes clear when one compares the number of voters polled who expressed a preference favoring one of the top two candidates for either party to the actual votes cast in support of those top four candidates.

(Continued on following page)

Regardless of any possible assumptions which might be drawn from the actual 1988 presidential preference primary election returns,[37] this court is not satisfied that the results of Dr. Willingham's 1988 exit poll provide an accurate source from which the plaintiffs might buttress their position that elections in Bleckley County are characterized by white bloc voting. All the poll really *proves*, aside from the fact that it was conducted in a less than scientific manner, is that Jesse Jackson enjoyed strong support among black voters responding to the poll. Assumptions may be drawn in either direction from the flawed data in the poll. This court cannot premise its decisions upon unsupported assumptions but must demand credible evidence.[38]

(Continued from previous page)

CANDIDATE	POLL SUPPORT	ACTUAL SUPPORT	% OF SUPPORTERS ANSWERING POLL
Bush	119	345	(34.5%)
Dole	86	245	(35.0%)
Gore	319	933	(34.2%)
Jackson	161	250	(64.4%)

[37] Plaintiffs have misstated the evidence when they argue in reference to the 1988 poll, "[i]ts results were very close to the actual vote total received by candidate Jackson there [Bleckley County]." ("Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law," p. 14). Unless, of course, by this statement plaintiffs mean only that they were able to poll most every Jackson voter.

[38] This is especially so considering the less than scientific manner in which the poll was conducted. Plaintiffs' evidence, admittedly drawn from peripheral sources, would ideally have been gathered in a manner which truly presented a local appraisal of voting in the county.

Dr. Willingham stated that he was unable to engage in regression analysis with regard to the 1988 Jesse Jackson campaign. He attributed this inability to the fact that in the interim between the 1984 and 1988 elections, Bleckley County was consolidated into one precinct. This, according to Dr. Willingham, created an additional obstacle for the plaintiffs in their ability to obtain and analyze evidence. However, regardless of the obstacles encountered by plaintiffs in their analyses, the evidence presented by way of Dr. Willingham's exit poll is inconclusive and unconvincing as to whether voting in the 1988 primary was racially polarized.[39]

Other Elections

The court notes briefly the evidence presented with regard to other elections which plaintiffs identify as elections involving racial issues or themes. These are: the 1974 Lt. Gubernatorial candidacy of J.B. Stoner, an avowed white racist who mustered an unsettling amount of support from the white electorate statewide in that year; the 1974 Gubernatorial primary, in which former Governor Lester Maddox, who had built his political career on a platform of segregation, carried Bleckley County; in the 1968 election in which, then segregationist,

[39] There is no contention on the part of plaintiffs that the consolidation of the multi-precinct system into one precinct was itself a violation of the Voting Rights Act; nor, do plaintiffs contend that the consolidation results in a violation of the Act.

George Wallace received the most votes in Bleckley County.[40]

In 1974, J.B. Stoner received 426 votes or 20.4% of the total votes cast. (Plaintiffs' Exhibit 360). This placed him a strong second to candidate Mary Hitt. Correspondingly, Lester Maddox carried Bleckley County over eventual party nominee and Governor George Busbee; Maddox received 1007 votes or 44% of the vote. The evidence presented with regard to the 1968 presidential election amounts to one line in *The Cochran Journal. See* Plaintiffs' Exhibit 270 ("Bleckley County went almost solid for George Wallace as expected").[41]

[40] The court notes but does not make its ruling upon the evidence presented by defendants with regard to the local results in the 1984 re-election of Georgia Court of Appeals Justice Robert Benham, a black member of the Georgia Court of Appeals. However, while the court agrees that Judge Benham, as an incumbent in a race for re-election to judicial office, was in a unique situation, one that little indicates the leanings of the county electorate with regard to local elections, *see Stallings*, 829 F.2d at 1558-59 (*quoting Gingles*, 106 S.Ct. at 2770) ("special circumstances, such as the absence of an opponent, incumbency, . . . may explain minority success in a polarized race"), the same types of fact sensitive protestations might easily be lodged against the use of the Jesse Jackson campaigns as an indication of voter preference on the local level. The court's holding does not reflect the influence of such speculative extraneous information with regard to the Jackson campaign, but only an analysis of the evidence presented.

[41] The court notes, but sees no relevance to defendants' evidence with regard to elections for statewide office which involved minor black candidates who received little support from either black or white voters. This evidence is simply a nullity.

Despite this additional evidence, which the court notes involved elections for nonlocal offices – occurring over 15 years ago, this case and the evidence presented with regard to alleged racially polarized voting nonetheless do not fit neatly into this stage of the *Gingles* analysis. Terms such as "racially polarized voting" and "white bloc voting" suggest a pattern or situation involving sustained recurrent bloc voting based upon race: the very evil which the Act and its amendments seek to redress. To employ a term so rich in meaning and background in reference to the evidence before this court would not be consistent with the term's true significance. Plaintiffs would have the court ignore that indeed the burden of proof lies with them to prove as a precondition to recovery that "the white majority votes sufficiently as a bloc to enable it **usually** to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67 (emphasis added). Despite plaintiffs efforts to weave the available data into a pattern, this evidence simply falls short of proving polarized voting. The essence of the evidence presented is summed up in the testimony of Councilman Basby. He testified:

> " . . . you have to be known by blacks and whites to get elected for public office; therefore, you need a percentage of all black and white to get elected." (Transcript p. 312).

The Voting Rights Act does not require more than this. For this court to require more, based upon the paucity of evidence presented, would fly in the face of both the Congressional prohibition against requiring representation in proportion to the percentage of black people in the

community as well as the ruling of the Supreme Court that "commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 48, n. 15, 106 S.Ct. at 2765, n. 15.[42]

Any additional evidence put forward by plaintiffs with regard to socio-economic barriers to voting and participation by blacks, while relevant to the court's analysis of the vote dilution claim under the totality of the circumstances, does not bear directly upon the courts [sic] analysis of whether election results evidence racial bloc voting.[43] As the *Collins* court stated, "[t]he legal standard for the existence of racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those

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[42] While the *Gingles* Court was referring specifically to the necessary evidence "where the contested electoral structure is a multi-member district," *Id.*, the Eleventh Circuit has stated, "[w]e consider the single-member county commission to be in all essential respects comparable with the multi-member district discussed by the Court in *Gingles* . . . " *Stallings*, 829 F.2d at 1549.

[43] Such evidence falls under the Supreme Court's umbrella over evidence which is "supportive of, but *not essential* to a minority voter's claim." *Id.* (emphasis the Court's). The court must, before considering such supportive evidence, first analyze the essential evidence as to whether racial bloc voting is present. In the absence of proof of this essential element, a plaintiff's claim must fail. To find otherwise would be inconsistent with the Supreme Court's use of the term "precondition" to describe this stage of the analysis. *Id.* at 50, 106 S.Ct. at 2766.

votes were cast the way they were nor whether there were other factors present in contested elections . . . " *Collins*, 816 F.2d at 935. Just as defendants may not, at this stage of the analysis, object that a particular election was characterized by "white backlash," etc., plaintiffs may not rely upon socio-economic or other barriers as specific evidence that voting in the community is racially polarized. *Id.*

The court is left with very little from which to determine whether racially polarized voting is characteristic of elections in Bleckley County. Dr. Engstrom himself admitted that the results from the 1984 regression analysis and the 1988 exit poll standing alone provide little evidence from which a court could conclude that racially polarized voting exists in Bleckley County.[44] Dr. Engstrom sought to temper his admission by adding, "if that's all we had." Yet, under prevailing law with regard to this stage of the court's evaluation, the evidence to which Dr. Engstrom referred *is all* the court has or can have. *Id.*

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[44] Dr. Engstrom's testimony was as follows:

Q: Dr. Engstrom, from a statistical standpoint, we've looked at the '84 Jesse Jackson race and the results of the exit poll in '88 as they concern Jesse Jackson. Would you agree, based on your experience as a political scientist, that that is very little evidence in determining racial polarization in a community of a government of 77 years?

A: That by itself?

Q: Yes.

(Continued on following page)

To conclude anything other than that plaintiffs have failed to demonstrate that "the white majority votes sufficiently as a bloc to enable it *usually* to defeat the minority's preferred candidate" *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67 (emphasis added), would ignore a rare point of agreement between the opposing experts in the case *sub judice:* that the electoral evidence in this case constitutes no more than a paucity. *See Stallings*, 829 F.2d at 1557 (*citing Gingles*, 106 S.Ct. at 2770) ("[T]he [*Gingles*] Court noted that racial bloc voting is more probative of a claim that a district experiences legally significant polarized voting, if a pattern of bloc voting is shown over a period of time, rather than the results of a single election"); *See also Gingles*, 478 U.S. at 48, n. 15, 106 S.Ct. at 2765-66, n. 15 ("By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the court simply requires that § 2 plaintiffs prove their case"). Consistent with these views, the court finds that plaintiffs evidence fails to demonstrate a pattern of racial bloc voting.[45]

(Continued from previous page)

A: Would be little evidence, if that's all we had.

(Tr. 483).

[45] The court is mindful of the Supreme Court's directive that "Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process." *Gingles*, 478 U.S. at 57, n. 25, 106 S.Ct. at 2769 n. 25. These other factors will indeed be considered upon the court's analysis of the remaining Senate factors; the court, however, rejects plaintiffs' arguments that evidence other than that drawn from previous elections, i.e., Bleckley County's history of racial segregation, racial themes in public forums, etc., amounts to evidence of racial bloc voting.

2) Cohesiveness

Despite the language from case law suggesting that to prove racially polarized voting is to prove cohesiveness, the court does not conversely read its finding of a lack of evidence of racially polarized voting to be dispositive of the issue of cohesiveness. In other words, to fail to prove polarization does not mean that the minority community suffers a lack of cohesiveness. Of course, failure to prove that Bleckley County elections are characterized by racial bloc voting effectively ends the need for further analysis of the three-pronged *Gingles* test. In the interest of completeness, the court seeks to analyze the evidence with regard to the alleged cohesiveness of Bleckley County's black community. However, as with the analysis of whether or not voting in Bleckley County is demonstrably polarized, the court is shackled by the paucity of evidence presented.[46]

While Dr. Engstrom offered testimony as to his preconceived notion that, in general, where blacks clearly have an opportunity to elect a candidate of their choice, blacks offer and are elected for those seats, there is little evidence in the record to verify that Bleckley County

[46] The court does not rely upon evidence which defendants sought to introduce regarding minor black candidates for state-wide office; the weak performances of these candidates are less a demonstration of a lack of minority cohesiveness than they are a commentary upon the political vitality of those particular candidates.

specifically has a cohesive black electorate.[47] Specific evidence of cohesiveness must be presented.

To hold that the expert testimony of Dr. Engstrom alone meets the requirement that plaintiffs demonstrate that cohesiveness of Bleckley County's black community would amount to an abdication of the requirement set out by the *Gingles* Court altogether; cohesiveness would be presumed. Plaintiffs' less than convincing arguments suggests that all any plaintiff need prove to meet the cohesiveness precondition would be the very existence of a black community. While the evidence presented at trial exceeds that referenced in plaintiffs' proposed findings of fact, the record nonetheless fails to demonstrate that the black community in Bleckley County has "common interests evidenced by a *pattern* of bloc voting." *See Solomon*, 899 F.2d at 1019 (*citing Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67) (emphasis added).

Dr. Engstrom's regression analysis of the 1984 primary provides strong evidence that Bleckley County's black electorate supported Jesse Jackson; the same conclusion might have been drawn from a well implemented poll of the voters in 1988. But the results of two presidential preference primaries alone cannot be said to evidence

[47] Plaintiffs' proposed findings of fact overstate the specificity of the testimony of Dr. Engstrom in this regard. Plaintiffs' expert was speaking in general terms and referred to the cohesiveness of the black community in Bleckley County only insofar as a perception of cohesiveness which Dr. Engstrom, without the benefit of having ever been to Bleckley County, assigned to the local white electorate. ("Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law," p. 24, ¶ 55; Transcript pp. 425, 435, 438).

a pattern. Plaintiffs also make reference to the electoral successes of black candidates in the majority black voting districts for the Bleckley County Board of Education as additional evidence of the cohesiveness of Bleckley County's black community. Specifically, plaintiffs point to the elections of plaintiff Reverend Hall to the school board in the 1986 election and the re-elections of Councilman Basby after the at-large electoral system was abandoned in favor of separate city council districts. Both of these men, black members of the community, represent majority black districts.

This court is not satisfied that plaintiffs have proven that the black community in Bleckley County is a politically cohesive one. This stage of the *Gingles* test is analogous to that in which the court analyzed the presence or absence of racial bloc voting evidence. Like that stage of the analysis of the present facts, the court is faced here with little credible evidence which would lend itself to a valid determination. Here, as there, counsel have presented conclusory materials without evidence sufficient to show the requisite pattern under *Gingles*.

The present case, so factually distinct from cases which have determined that a cohesive minority electorate merited remedy under the *Gingles* test, is void of credible evidence to demonstrate either a strong pattern of correlation between the number of registered black voters and the number of votes received by a candidate expected to receive black support or a pattern of unified support for particular candidates from the black community. This is what *Gingles* requires, and this court may require no less at this stage of its analysis. Plaintiff's

evidence simply fails to prove that Bleckley County's black community is politically cohesive.

3) Compactness

There can be but little dispute that the black community is sufficiently geographically compact to meet the *Gingles* standard. To their credit, counsel apparently refrained from their respective propensities and left this area unencumbered by surplusage. Defendants themselves relied in part upon evidence drawn from the majority black school board voting district to put forward evidence refuting plaintiffs' arguments with regard to cohesiveness. Although Bleckley County's entire black community is not concentrated in a single area, the evidence drawn from the 1988 voter registration data offered by defendants demonstrates that voting district #2 is approximately 55% black; blacks in the other four districts make up approximately 10% or less of the population in that district. Were the evidence to demonstrate that the commission should be enlarged, there is certainly a concentration of black voters in at least one demographic area. (Defendants' Exhibit 13).

4) Results of the *Gingles* Test

Despite a full presentation by the parties, an evaluation of all the available evidence can lead to only one conclusion. Plaintiffs' evidence fails to meet two requisite preconditions to relief as set out by *Gingles*. There is insufficient available evidence from which the court might determine that either racial bloc voting or a cohesive black electorate are proven characteristics of Bleckley

County.[48] Considering only those factors set out by the *Gingles* Court, plaintiffs have failed to prove that the current single commissioner form of government in Bleckley County results in less opportunity for members of the black community to participate in the political process or to elect representatives of their choice. *See Gingles*, 478 U.S. at 48, n. 15, 106 S.Ct. at 2765, n. 15 ("Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the . . . [challenged] structure interferes with their ability to elect their preferred candidates").

B. Other Senate Factors

Once the *Gingles* test is satisfied, it is unclear whether a court is to analyze factors beyond those set out by the *Gingles* Court. This court, however, is not faced with such a situation. The significance of any additional evidence relevant to other Senate factors is limited by the court's determination that plaintiffs have failed to present evidence sufficient to satisfy the *Gingles* test. *See Gingles*, 478 U.S. at 49, 106 S.Ct. at 2766 ("These circumstances [the *Gingles* test] are *necessary preconditions* for multi-member districts to operate to impair minority voters ability to elect representatives of their choice . . . ") (emphasis

[48] The court does not suggest a failure to present otherwise available evidence leaves plaintiffs' case incomplete. As evidenced by the expansive, and no doubt expensive, efforts of the respective experts and attorneys, the evidence supporting the requisite *Gingles* preconditions is simply unavailable.

added). As stated above, the Eleventh Circuit has determined that the single member commission is in all relevant respects comparable with the multi-member districts. *Stallings*, 829 F.2d at 1549; n. 42, *supra*.

It would appear, then, that this court is not called upon to analyze the remaining Senate factors in order to render an opinion in the case *sub judice*. Were it not for a singular cryptic directive from the Supreme Court, this court's already exhaustive analysis would be at its end. However, in *Gingles*, the Court noted:

> Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process.

Gingles, 478 U.S. at 57, n. 25, 106 S.Ct. at 2769-70, n. 25. In *Gingles*, a case which like most cases addressing themselves to alleged violations of § 2 of the Act, involved evidence drawn from several elections, the Court appears to have attempted to anticipate a claim such as the unusual one before this court today. *See Westwego Citizens for Better Government v. Westwego*, 906 F.2d 1042, 1045 (5th Cir.1990) ("Gingles" teaches that where only a few (or no) indigenous elections include black sponsored candidates, a vote dilution claim is not foreclosed").

Sensitive to Supreme Court directives and consistent with cases addressing situations where local election returns suffer limited availability, this court has considered credible evidence put forward by plaintiffs with regard to allegations that racial bloc voting contaminates the challenged electoral structure in Bleckley County. It appears, according to the cases which have addressed the

footnote in *Gingles*, that the language used by the Supreme Court, while ambiguous, was intended to prevent trial courts from refusing to consider credible evidence drawn from any election with regard to racially polarized voting. However, read in another light, the footnote arguably directs a trial court to return to the Senate factors and the flexible test which have been otherwise abandoned. Even were this court to accept this reading of the Supreme Court directive, a reading which the court notes was not specifically proposed by plaintiffs, the evidence, nevertheless, fails to demonstrate that a change in the current structure of the county commission constitutes an available or proper remedy under the Act.

The facts in this case clearly indicate that Bleckley County's black community yet suffers the indignities associated with a proportionally poorer socio-economic status. Plaintiffs' expert, Dr. Willingham, provided extensive testimony that blacks in Bleckley County continue to suffer from a depressed socio-economic status, and that their socio-economic status hinders the possibility of blacks participating actively in the political process. He added that traditional barriers still work to make it unusually difficult for a candidate, black or white, who is depending upon black voters to sustain the interest of black community voters. There was testimony that unemployment and illiteracy are considerably higher within the black community than amongst whites. There appear also to have been problems in the past with regard to low black representation among workers at the election polling place.

Yet, with regard to the remaining Senate factors, it appears that little can be said to disparage Bleckley County. It is undisputed that there is no slating process to stand as a barrier to minority participation. Finally, as to whether the commission in Bleckley County fails to respond to the needs of the community or whether the county, as evidenced in the 1986 referendum, seeks to retain the single member commission to effectuate a tenuous policy, much has been said, but little has been proven. As stated above, there appears to be widespread local disagreement over the respective merits and shortcomings of the alternative systems given the size and revenue base of Bleckley County. After considering all the relevant evidence, it appears that what remains before the court is simply a whole community's disagreement over their preferred form of local government. This court does not have the authority to resolve such purely political disputes. The court's powers extend only to the resolution of disputes involving a violation of the Constitution, the Voting Rights Act or some other law.

The court's brief analysis of these additional factors provides some indication as to why the three principal factors covered by the *Gingles* test enjoy preferred evidentiary status in vote dilution claims. While plaintiffs' inability to present sufficient credible evidence drawn from local elections does not foreclose a vote dilution claim, the inability to present credible evidence supportive of the factors to be considered under the Act does foreclose a successful one in the case *sub judice*. Under any standard, under any reasonable test, considering every piece of credible relevant evidence and all factors,

plaintiffs' challenges to Bleckley County's single member commission must fail.

CONCLUSION

Plaintiffs have failed to meet either the minimum preconditions under the *Gingles* test or to present sufficient evidence in light of the other Senate factors under the totality of the circumstances. The evidence presented at trial with regard to these factors, while characteristically protracted, was neither compelling nor persuasive.

While a naked analysis of the Bleckley County voter registration rolls leaves exposed the possibility that a white candidate harnessing all of the white voter support in Bleckley County could conceivably use that unified support to trample the equally imaginary candidate (black or white) supported by the whole of the black electorate, the evidence presented at trial, by both defendants *and* plaintiffs, when interwoven with the relevant case law and considered under the totality of the circumstances, does not clothe this court with the power to strike down an electoral practice or procedure which *might* lead to such an abhorrent potential result. To require the change sought by plaintiffs, based upon the paucity of evidence before this court, would serve the purpose specifically proscribed by Congress of ensuring that members of the black community would be elected in numbers equal to their proportion in the population.

Plaintiffs cannot prevail on their claims that Bleckley County's sole commissioner form of government violates either the Constitution or Section 2 of the Voting Rights

Act. Accordingly, let judgment be entered for the defendants.

SO ORDERED.

Rev. E.K. HALL, Sr.; David Walker; U.S. Donalson; Richard Harris; Willie Ates; Rev. Wilson C. Roberson; and NAACP Chapter of Cochran, Bleckley County, Plaintiffs-Appellants,

v.

Jackie HOLDER, Individually and in his official capacity as County Commissioner for Bleckley County, Georgia; Robert Johnson, Individually and in his official capacity as Superintendent of Elections for Bleckley County; Charles Killebrew, Individually and in his official capacity as Mayor of the City of Cochran; Lonnie Barlow; Ben Jessup; C.C. Crooms; Willie Basby; Billy Ray Godfrey, and T.C. Greer, Individually and in their official capacities as Aldermen of the City of Cochran; William J. Lucas, Individually and in his official capacity as Superintendent of Elections for the City of Cochran; Freddie White; Wayne Rogers; Wayne Tripp; Sonja Curtis, and J. Larry Williams, Individually and in their official capacities as Members of the Bleckley County Board of Education, Defendants-Appellees.

No. 91-8306.

United States Court of appeals,
Eleventh Circuit.

March 25, 1992.

Black voters brought action complaining that single county commissioner form of government in Bleckley County, Georgia, violated Constitution and Voting Rights Act. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, No. CIV85-242-2-MAC(WDO), 757 F.Supp. 1560, found no violation of Constitution or Voting Rights Act, and appeal

was taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) determination of violation of § 2 of Voting Rights Act should be based on "totality of circumstances" test and is not limited to electoral evidence, and (2) voters showed that county's black electorate was sufficiently large and geographically compact and was a politically cohesive minority, and that white majority bloc voted so as to usually defeat black minority's preferred candidates, which established that sole commissioner system violated § 2.

Reversed and remanded.

Christopher Coates, Milledgeville, Ga., Laughlin McDonald, ACLU, Atlanta, Ga., for plaintiffs-appellants.

R. Napier Murphy, Martin Snow, Grant & Napier, John C. Daniel, Ill., Macon, Ga., William Lonnie Barlow, Arnold & Barlow, Cochran, Ga., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before FAY and HATCHETT, Circuit Judges, and GIBSON*, Senior Circuit Judge.

FAY, Circuit Judge:

This appeal involves a challenge to the sole commissioner form of county government utilized in Bleckley County, Georgia. Following a four day bench trial, the district court found that the plaintiffs had failed to meet

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

their burden of proof on both their statutory and constitutional claims. For the reasons that follow, we REVERSE the judgment of the district court.

I. BACKGROUND

A. *Bleckley County*

The history of Bleckley County began in 1912 when the Georgia legislature created Bleckley County from land located at the northeastern end of Pulaski County, Georgia. Encompassing about 219 square miles, Bleckley County is a rural county located in the central region of Georgia, approximately forty miles southeast of Macon.

Throughout its existence, Bleckley County has had a population that has ranged from about 9,000 residents to nearly 11,000 residents. According to census figures, the population of Bleckley County numbered 10,767 in 1980.[1] That population is approximately 22% black, 77% white, and 1% other.[2] The racial composition of Bleckley

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[1] The population figures used at trial come from the 1980 census. Since the trial, however, the data from the 1990 census has become available. The new census reveals that Bleckley County's population has decreased to 10,430. The population decrease of blacks has been proportionately smaller than the decrease of whites, thereby causing Bleckley County to have a slightly increased percentage of blacks.

[2] Nearly half of Bleckley County's population lives in the city of Cochran, the county seat. In Cochran, the percentage of black residents is considerably higher than in the county as a whole. There the racial composition of the population is approximately 33% black, 64% white, and 3% other.

County's voting age population is 19% black, 80% white, and 1% other. Voter registration levels in Bleckley County are roughly equivalent among blacks and whites, with black and white registration each at about 70% of each group's respective eligible population.

Since its creation, Bleckley County has operated with a sole commissioner form of county government. *See* 1912 Ga.Laws 38; 1913 Ga.Laws 345. This sole commissioner is the "county governing authority" under Georgia law, O.C.G.A. § 1-3-3(7), and he is vested with all the corresponding powers and duties, *see id.* § 36-5-22.1.

Bleckley County's sole commissioner is elected in an at-large county-wide election. Although the commissioner race has at times been subjected to a majority vote requirement, throughout most of its history, Bleckley County has elected its sole commissioner by a simple plurality vote. Since 1964, however, the county must elect its commissioner by a majority vote. *See* O.C.G.A. § 21-2-501.

Today, the election for county commissioner is held at the Jaycee Barn in Cochran. This facility, a building belonging to an all-white civic club, is the sole polling place for the entire 219 square mile area that makes up Bleckley County.[3] This sole precinct is also used for the

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[3] A number of polling places were previously available throughout Bleckley County, providing ready access to voters in the outlying areas of the county. These precincts were consolidated shortly after the 1984 presidential primaries.

elections of other county officials, including the members of the county's school board.[4]

B. *Procedural History*

On July 17, 1985, the plaintiffs-appellants in this case, black voters residing in Bleckley County, Georgia, together with the NAACP Chapter of Cochran/Bleckley County filed a complaint in the United States District Court for the Middle District of Georgia. Among the claims asserted, the plaintiffs presented a challenge to Bleckley County's form of county government under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and under the Fourteenth and Fifteenth Amendments.[5] The defendants named in this challenge, the appellees herein, are Bleckley County's sole county commissioner and the county's superintendent of elections.

In December of 1989, over four years after this action was commenced, the district court tried this case without a jury. On March 7, 1991, more than a year after that trial, the district court entered an extensive order finding that

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[4] Despite the existence of only one precinct, school board members are not elected in an at-large election. Instead, the multi-member board is elected from five single-member districts. This is accomplished in the sole precinct setting by assigning the voters from each district to specified voting machines that correspond to their districts.

[5] In their complaint, the plaintiffs also challenged the manner of electing the Bleckley County Board of Education and the Cochran City Council. Those claims were settled prior to the trial of this case, however, and the challenge to Bleckley County's form of government was the sole claim tried in the district court.

the plaintiffs had failed to establish either a racially discriminatory intent in the creation or maintenance of Bleckley County's form of government or an impermissible dilution of the electoral power of Bleckley County's black minority. The district court entered a final judgment for the defendants, and the plaintiffs filed a timely appeal.

II. DISCUSSION

In reviewing the judgment of the district court, we are bound by the clearly erroneous test set forth in Rule 52(a) of the Federal Rules of Civil Procedure, the standard upon which an appellate court is to review ultimate factual findings of vote dilution. *Thornburg v. Gingles*, 478 U.S. 30, 78-79, 106 S.Ct. 2752, 2781, 92 L.Ed.2d 25 (1986); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1554 (11th Cir.1987,) *cert. denied*, 485 U.S. 936, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988). Nonetheless, this standard does not bar a court from correcting errors of law or findings of fact based on misconception of the law. *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781; *Concerned Citizens v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990); *Stallings*, 829 F.2d at 1554.

A. *The Voting Rights Act*

The statutory claim we address on appeal is unusual in that it challenges a local form of government

composed solely of one commissioner.[6] It is not a unique challenge, however, and we have already held that § 2 challenges to sole commissioner forms of government are subject to the same analysis employed by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). *Stallings*, 829 F.2d at 1549

The essential dictate of § 2 of the Voting Rights Act, as amended, is:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. § 1973(a). At one time, § 2 was interpreted to require proof of discriminatory intent in the design or maintenance of a challenged scheme before plaintiffs could prevail on their statutory claims. *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion). In 1982, however, Congress amended § 2 so as to make clear that the "results test" utilized by pre-*Bolden* courts is the proper standard by which § 2 claims are to be measured. *See Chisom v. Roemer*, ___ U.S. ___,

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[6] Although the plaintiffs asserted both statutory and constitutional vote dilution claims, because we hold that this case establishes a violation of § 2 of the Voting Rights Act, we do not reach the plaintiffs' claim of a constitutional violation. *See Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 1578, 80 L.Ed.2d 36 (1984) (a violation of § 2 moots a constitutional claim of vote dilution).

111 S.Ct. 2354, 2363 & n. 21, 115 L.Ed.2d 348 (1991); *Gingles*, 478 U.S. at 43-44 & n. 8, 106 S.Ct. at 2762 & n. 8; *Solomon v. Liberty County*, 899 F.2d 1012, 1015 (11th Cir.1990) (en banc) (Kravitch, J., specially concurring), *cert. denied*, ___ U.S. ___, 111 S.Ct. 670, 112 L.Ed.2d 663 (1991); *id.* at 1027-32 (Tjoflat, C.J., specially concurring). In amending § 2, Congress also made clear that courts are to evaluate § 2 claims in light of "the totality of circumstances" upon which such claims are premised. 42 U.S.C. § 1973(b). Accordingly, courts are to consider a wide variety of factors when confronted with § 2 challenges.[7]

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[7] The factors most frequently set forth for consideration are the "typical factors" listed in the Senate Report accompanying the 1982 amendments to § 2. These factors, now known as "the Senate Report factors," are listed below:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the

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Although various factors may be relevant to a § 2 claim, before a challenged procedure will violate § 2, "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 49, 106 S.Ct.

(Continued from previous page)

effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether the political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (footnotes omitted). The Senate Report also noted that additional factors had been shown to have probative value in establishing a violation:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207 (footnotes omitted). Despite the Senate's express enumeration of these typical factors, "this list of factors is neither comprehensiye nor exclusive." *Thornburg v. Gingles*, 478 U.S. 30, 45, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1980). Other factors may be considered, and a "functional" view of the political process will determine the interplay and weight of the various relevant factors. *See id.*

at 2766. Accordingly, there are three "necessary preconditions" to the establishment of a § 2 violation: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S.Ct. at 2766 (citations omitted).

Although the *Gingles* Court set forth these three factors as preconditions to a § 2 claim, we are mindful that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47, 106 S.Ct. at 2764. A limitation on the evidence to be considered in evaluating the *Gingles* factors is neither what Congress intended in § 2 nor what the Supreme Court directed in *Gingles*. Rather, the *Gingles* decision places a "gloss" on the Senate Report factors, limiting the use of the factors by requiring that the three *Gingles* factors be established to prove a vote dilution claim. *Stallings*, 829 F.2d at 1555 (citing *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir.1987)). The *Gingles* majority did not, however, limit the manner in which the threshold factors may be proven. In fact, the legislative history of § 2 reveals that Congress espoused a "flexible, fact-intensive test for § 2 violations." *Gingles*, 478 U.S. at 46, 106

S.Ct. at 2764. Thus, the totality of the circumstances surrounding a § 2 claim may properly be considered when determining whether plaintiffs have established the three *Gingles* preconditions.[8] *See Solomon*, 899 F.2d at 1017 (Kravitch, J., specially concurring). Although § 2's functional view of the political process elevates certain Senate Report factors because of their direct bearing on the § 2 threshold inquiry, other relevant factors remain "supportive of, but *not essential to*, a minority voter's claim." *Gingles*, 478 U.S. at 48-49 & n. 15, 106 S.Ct. at 2765 & n. 15. These factors become relevant at the *Gingles* threshold stage insofar as they are supportive of the three *Gingles*

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[8] If the totality of the circumstances could not be considered in reviewing the *Gingles* factors, then courts would often be left to consider statistical and census data in an inappropriate contextual vacuum. The interaction of social and historical conditions with the challenged system would not be considered despite the fact that such interactions are central to § 2 claims. Moreover, plaintiffs would always be forced to present mathematically "certain" statistical data in order to sustain their evidentiary burdens under the preponderance of the evidence standard. Even where the totality of the circumstances established that a challenged system violated § 2, plaintiffs would be unable to prevail if the method of polling or the electorate's size and composition were such that the gathering of mathematically "certain" statistical data would be impossible. *Gingles* does not require such a result. *Cf.* 478 U.S. at 57 n. 25, 106 S.Ct. at 2769-70 n. 25.

factors. The additional factors, however, need not be present to satisfy the *Gingles* test.[9]

B. *Gingles Analysis*

On appeal, the plaintiffs-appellants argue that: (1) the district court erred as a matter of law by limiting its consideration to only certain types of evidence of a § 2 violation; and (2) the district court erred in finding that the plaintiffs had failed to meet their burden of proof. In reviewing the district court's determinations on the threshold *Gingles* factors, we agree with the district court that Bleckley County's black electorate is sufficiently large and geographically compact to meet the first prong of the *Gingles* test. However, we disagree that the evidence failed to establish the other two *Gingles* factors, a politically cohesive minority and a white majority bloc that votes so as to usually defeat the black minority's preferred candidates. Additionally, we hold that Bleckley County's sole commissioner system violates § 2.

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[9] Although the *Gingles* factors may have been established in a particular case, the continuing role of the parties and of the court is unclear: This circuit remains divided on the issues of whether plaintiffs can make out a § 2 violation simply by establishing the *Gingles* factors and whether defendants can raise a defense under the totality of the circumstances after the plaintiffs have satisfied the *Gingles* preconditions. *Solomon v. Liberty County*, 899 F.2d 1012, 1013 (11th Cir.1990) (en banc) (per curiam); *id.* at 1017, 1021 (Kravitch, J., specially concurring); *id.* at 1033 (Tjoflat, C.J., specially concurring).

(1) Size and Geographic Compactness of Minority Group

The evidence presented at trial reveals that black voters comprise a majority of the electorate in one of the five districts currently found in Bleckley County.[10] The defendants argue, however, that using these districts as a measure of the size and geographic compactness of Bleckley County's electorate is inappropriate. Instead, the defendants contend that the proper measure of size and geographic compactness should be the entire county. Because the county currently elects only one commissioner, the defendants argue that a black electorate constituting only 22% of the county's population can never form a majority with the potential to elect Bleckley County's sole commissioner. They argue that it is improper to subdivide this "commissioner district" when performing a § 2 analysis.

Although § 2 clearly states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population," 42 U.S.C. § 1973(b), it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive. In *Gingles*, the Supreme Court recognized that threshold significance is given to this first

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[10] The five currently existing districts were formed for purposes of electing the county's multi-member school board. Within one of these districts (District 2), black voters constitute approximately 65% of the electorate; within the other districts, they constitute no more than 12% of the electorate. (Defs. Ex. 13).

Gingles factor because: "Unless minority voters possess the *potential* to elect representatives *in the absence of the challenged structure or practice*, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17 (second emphasis added). Thus, before a voting rights injury can be established, the minority group must demonstrate its potential electoral power in the absence of the challenged structure. It is therefore highly relevant to the *Gingles* inquiry "whether black voters . . . are sufficiently numerous and compact to constitute a majority in a single member district, *if single member districts were created out of the one county district.*" *Stallings*, 829 F.2d at 1563 (emphasis added). For that reason, this court remanded a challenge to the sole commissioner structure in Carroll County, Georgia to the district court with instructions to consider size and geographic compactness within proposed three member and five member forms of commission government. *Id.*

Because the evidence in this case reveals that Bleckley County's black voters are sufficiently numerous and geographically compact to constitute a majority in a single-member district (*e.g.*, District 2), we agree with the district court that the first *Gingles* factor has been satisfied.

(2) Existence of Racial Bloc Voting

In analyzing the issue of racial bloc voting, the district court focussed on raw election figures and statistical calculations. In particular, the district court concentrated

on regression analysis statistics from the 1984 presidential primary and on exit poll data from the 1988 presidential primary, evidence taken from presidential primaries involving the Reverend Jesse Jackson. The court also looked to the successes of local black politician Willie Basby in Cochran City Council elections and discussed the support garnered by black candidates in a number of races. The district court then limited its consideration to only that evidence which it believed § 2 jurisprudence would allow it to consider. It concluded from that evidence that there was a paucity of electoral evidence showing racially polarized voting, *Hall v. Holder*, 757 F.Supp. 1560, 1580 (M.D.Ga.1991), and that the plaintiffs had failed to carry their burden of proof on the racial bloc voting *Gingles* factor.

However, the district court reached this conclusion while operating under a misconception of the law. The district court stated that "under prevailing law with regard to this stage of the court's evaluation, the evidence [from the 1984 and 1988 presidential primaries] *is all* the court has or can have." *Hall*, 757 F.Supp. at 1580 (citing *Collins*, 816 F.2d at 935). The court reasoned that non-electoral evidence "does not bear directly upon the courts [sic] analysis of whether election results evidence racial bloc voting." *Id.* at 1579 (footnote omitted). Although the district court's legal interpretation of the evidence would support the district court's ultimate conclusion, such restricted, piecemeal consideration of the evidence failed to take into account the synergistic effects of evidence in establishing racially polarized voting.

Here, non-electoral evidence was not being offered to rebut electoral evidence showing the existence of racially

polarized voting; instead, it was offered to buttress such evidence. Moreover, the use of non-expert testimony and non-statistical evidence has been approved by this court as a means of proving racially polarized voting. *See, e.g., Stallings*, 829 F.2d at 1558 (noting that it is "clearly acceptable" to use non-expert testimony in establishing racially polarized voting); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 n. 34 (11th Cir.) (quoting *Nevett v. Sides*, 571 F.2d 209, 223 n. 18 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980)), *cert. denied and appeal dismissed*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 331 (1984); *see also Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 (5th Cir. 1991). *But see Collins*, 816 F.2d at 935-36 (rejecting the use of causation evidence concerning voting patterns). In situations where election data and derivative statistical information are systemically unavailable, such as when plaintiff minority groups are unable to sponsor candidates, the Supreme Court has further directed courts to rely on factors beyond election data that tend to prove unequal access to the electoral process. *See Gingles*, 478 U.S. at 57 n. 25, 106 S.Ct. at 2770.[11] Examining the issue of racial bloc voting under the totality of the circumstances existing in Bleckley County, we are forced to conclude that the district court reached a clearly erroneous conclusion based on its misconception of the law.

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[11] Although the district court correctly interpreted this language in *Gingles* as expanding the scope of permissible evidence of racial bloc voting, it construed the expansion to include nothing but data from exogenous elections, *i.e.*, elections for offices existing apart from the challenged local structure. We find that construction of *Gingles* to be too narrow.

In this case, the district court was not confronted with a complete lack of relevant election and statistical information. Indeed, Bleckley County election results for races in which blacks ran for state and national offices were submitted into evidence. Similarly, election results were submitted for races in which blacks ran for office in the city of Cochran.[12] Yet, blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government. Specifically, Bleckley County's blacks have not sponsored a candidate for the sole commissioner seat, and no black has ever run for the office of commissioner.[13] Lay testimony by Bleckley County's black community leaders, many of whom are seasoned local politicians, revealed a belief that it is next to impossible for a black candidate to win an at-large county-wide election in Bleckley County, primarily because of the

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[12] Despite the submission of these election results, statistical correlations between the race of voters and the way in which ballots were cast could not generally be calculated in Bleckley County. This absence of statistical data resulted directly from the manner in which Bleckley County runs its elections and the manner in which Bleckley County records the results of those elections. The district court specifically stated that it was not suggesting that the plaintiffs had failed to present all available statistical evidence; the court simply believed that the instant case involved a paucity of *statistical* evidence. *Hall v. Holder*, 757 F.Supp. 1560, 1573 n. 22 (M.D.Ga.1991).

[13] Only one black candidate, the Reverend E.K. Hall, has run for a county-wide position in Bleckley County. He lost a race against a white candidate in 1984, only to be elected in 1986 as the county school board representative of District 2, Bleckley County's majority black district.

impact of the non-Cochran vote, a vote having a substantially lower percentage of blacks. The individual and collective experiences of these black leaders reveal that, as a practical political matter, blacks are unable to sponsor candidates for Bleckley County's sole commissioner office because such candidacies are futile. The district court itself recognized this futility at trial, commenting as follows: "Having run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county. You're going to put your hard-earned time and shoe leather campaigning throughout this county . . . under these circumstances?" (R6:808). Notwithstanding this assertion, the district court relied only on electoral evidence and chose not to consider the impact of the totality of the circumstances on the issue of racial bloc voting.

The district court did, however, recognize the following: "The regression analysis [of the 1984 presidential primary] demonstrates that white and black voters did not agree upon whom the democratic [sic] party should nominate. Jesse Jackson enjoyed the electoral support of a majority of black voters; very few white voters supported Jesse Jackson." *Hall*, 757 F.Supp. at 1576. That conclusion resulted from regression analysis data revealing that 60.8% of black voters supported Jackson while only 0.9% of white voters supported Jackson.[14] Exist poll data also

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[14] The district court pointed out that the plaintiffs' regression analysis did not include an indication of a "margin of error." Yet, the regression figures were nearly identical to figures compiled in a *CBS News/New York Times* exit poll for the state of Georgia. Moreover, the record reveals that correlation

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indicated that black support for Jackson increased to over 90% of the black electorate in the 1988 presidential primary while white support was at a level of less than 2% of the white electorate.[15] Yet, the district court concluded that this evidence failed to establish a pattern of racially polarized voting or racial bloc voting. The district court reasoned that there was no specific, direct evidence of racial polarization or racial bloc voting *in local county elections*. The record and the district court's factual findings nonetheless reveal that there was racially polarized voting in Bleckley County.

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coefficients for the regression analysis were over 0.9 for the "r" values and over 0.8 for the "r^2" values, both in the weighted and in the unweighted regression analyses. The range for such coefficients ranges from 0 to 1, with 0 indicating no relationship and 1 indicating a perfectly consistent relationship. *See Solomon*, 899 F.2d at 1020 n. 9 (Kravitch, J., specially concurring).

[15] The district court erred in concluding that the exit poll data had no evidentiary value whatsoever simply because the court concluded that the poll required the drawing of "assumptions" from the actual election returns. The court's error was the result of its erroneous legal conclusion that the poll results must themselves *prove* racially polarized voting in the analyzed election. *See Hall*, 757 F.Supp. at 1578 ("All the poll really *proves*, aside form the fact that it was conducted in a less than scientific manner, is that Jesse Jackson enjoyed strong support among black voters responding to the poll."). Although the court found that assumptions could be drawn in "either direction from the flawed data in the poll," *id.*, the court did not consider the light that the totality of the circumstances surrounding that election would have shed on the poll

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Election results in the city of Cochran reveal that black candidates were regularly defeated by white candidates in at-large elections conducted in the city.[16] However, after city elections were restructured so that the city of Cochran had a majority black district, black candidates were elected as the representatives of the majority black district. Similarly, although the only black candidate who had run in an at-large county-wide election had been soundly defeated, that same candidate was elected by the newly created majority black school board district in the first election where the majority black district was permitted to elect a county official.

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results. Such evidence would have strengthened the credibility and reliability of the poll as an indicator of racial bloc voting. At the same time, the increased evidentiary value of the poll results would have served to increase the evidentiary value of the other evidence in establishing a pattern of racial bloc voting. In the context of establishing a pattern of racially polarized voting, the interplay of evidence with its synergistic effects should not be ignored.

[16] The only local black politician who has enjoyed any appreciable success in at-large elections in Cochran is Willie Basby. *See Hall*, 757 F.Supp. at 1568 (setting forth the election results in Basby's races for the Cochran City Council). Although the district court generally excluded Cochran election results from its consideration because they did not involve the full Bleckley County electorate, *id.* at 1574 n. 24, the court stressed the "electoral anthology of the triumphs" of Councilman Basby as the most pronounced evidence offered by the plaintiffs. *Id.* at 1573. Yet, the district court recognized at trial that Basby's successes were an aberration, due largely to circumstances that were particular to Basby and which had allowed Basby to garner unusually high cross-over support from Cochran's white voters. (R6:808, 811). Moreover, Basby's

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Evidence was also presented of elections involving racial themes: the 1974 Lt. Gubernatorial race involving J.B. Stoner, an avowed white racist; the 1966 and 1974 Gubernatorial races involving Lester Maddox, a former governor who had built his political career on segregation; and the 1968 presidential race involving then-segregationist George Wallace. Although these elections occurred over fifteen years prior to the trial of this case, the significant support garnered by these candidates indicates that a substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals as late as the mid 1970's, and that they voted accordingly.

A number of the district court's other specific factual findings, coupled with election evidence, reveal that

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initial success occurred only during an election requiring a simple plurality, his first two victories were attained by narrow margins, and he has been running unopposed since his third victory (attained in his fifth campaign).

Still, the district court did not properly discount Basby's successes despite Basby's aberrational status and despite Basby's own assertions that he could not achieve the same success on a county-wide basis. Instead, the court considered his campaigns, although not "as rebuttal evidence against a showing that blacks have not fared well in elections in Bleckley County." *Id.* at 1574 n. 24. The many and much more common defeats of other black candidates were relegated to the following level of consideration: "the court also takes note of the city council elections in which other black candidates did not fare so well, i.e., plaintiff Harris (1977), plaintiff Hall (1978), etc." *Id.* Notably, there were 12 at-large elections in which blacks ran losing campaigns in Cochran against white candidates. Basby, on the other hand, was elected over white candidates on 3 occasions: once with 39% of the vote, once with 50.5% of the vote, and once with 70% of the vote.

Bleckley County indeed suffers from racially polarized voting. For instance, Bleckley County had enforced racial segregation in all aspects of local government and local government services until forced to change by federal legislation in the 1960's. *Id.* at 1562. Bleckley County had debated and fought desegregation in all aspects of public life, continuing its resistance until as late as the early 1970's. *See id.* Local government had deprived blacks of the opportunity to participate in public life and government, even prohibiting blacks from registering to vote and from voting until well into the 1960's. Although Bleckley County's government discontinued these overt racial practices, largely due to federal intervention, the black citizens of Bleckley County continue to suffer from the effects of discrimination – socio-economic conditions that are far more depressed than those of their white counterparts.[17] *Id.* at 1562-63. This depressed socio-economic situation "hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process," *id.* at 1563, with the sole precinct system in Bleckley County serving as a further barrier to active political participation by blacks, *id.* at 1563 n. 3. Moreover, the "personal preferences" of Bleckley County's

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[17] The depressed socio-economic condition of Bleckley County blacks is reflected in circumstances such as the low level of blacks with high school educations, the lack of telephones and automobiles in black homes, the low per capita and family incomes of blacks, and the relatively large percentage of blacks living below the federally recognized poverty line.

citizens has resulted in racially exclusive organizations[18] in Bleckley County. These organizations, in turn, give blacks and whites in Bleckley County a different exposure to the candidates running for local, state, and national offices.

In its *Gingles* threshold analysis, the district court decided not to consider any of the evidence presented by the plaintiffs other than the presidential primary election data for 1984 and 1988. It discounted the value of that data and found it insufficient to establish racial bloc voting. The court also chose to discount the value of elections in the city of Cochran, with the possible exception of the successes of Willie Basby. Other evidence was neither considered nor discussed within the scope of the *Gingles* analysis because the court believed that it was prohibited from considering the evidence in evaluating the plaintiffs' compliance with the *Gingles* factors. These decisions were the crucial errors committed by the district court as a result of its misconception of the law.

When the evidence found in the record is analyzed within the proper legal framework, *i.e.*, the totality of the circumstances is reviewed for its impact upon the issue of racially polarized voting,[19] the evidence conclusively

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[18] These organizations are mostly churches, civic clubs, and social clubs. The record reveals that these generally segregated organizations frequently serve as forums for political candidates and political discourse.

[19] We stress that evidence of the totality of the circumstances is normally relevant at this threshold stage of the proceedings only insofar as it presents evidence bearing on the *Gingles* factors. The other Senate Report factors will not assist

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establishes a pattern of racially polarized voting in Bleckley County. Accordingly, the district court's conclusion that the *Gingles* factor requiring racial bloc voting was not satisfied in this case is clearly erroneous.

(3) Existence of Political Cohesiveness

Upon reviewing the record in this case, we also hold that the district court erred in concluding that Bleckley County lacks a politically cohesive black electorate. In reviewing this *Gingles* factor, the district court essentially committed the same error that it committed in analyzing the issue of racial bloc voting. That error was further compounded because the district court evaluated the existence of political cohesiveness after concluding that there was no racially polarized voting in Bleckley County. We have previously noted that "proof of racial polarization may . . . be found sufficient by this court to make the necessary finding of cohesiveness." *Stallings*, 829 F.2d at 1563 n. 15. Nonetheless, the record evidence and the specific factual findings of the district court, coupled with the existence of racially polarized voting, conclusively reveal that the *Gingles* requirement of political cohesiveness has been satisfied.

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plaintiffs in meeting the necessary preconditions simply because they are found to exist in a particular case. *Gingles*, 478 U.S. at 49 n. 15, 106 S.Ct. at 2765 n. 15. At this threshold stage, their importance is derived solely from the supportive, synergistic effect that they lend to the determination of the *Gingles* factors. However, where the challenged electoral system entirely forecloses the gathering of evidence bearing directly on the *Gingles* factors, courts must rely on other factors establishing unequal access to the political process, even though the *Gingles* factors cannot be proven. *Id.* at 57 n. 25, 106 S.Ct. at 2769-70 n. 25.

C. *Violation of § 2 in Bleckley County*

The district court not only erred in its legal analysis of the *Gingles* threshold factors, but it also erred in its "brief" final analysis of the plaintiffs' § 2 claim. That final analysis of the plaintiffs' claim under the totality of the circumstances, undertaken despite the court's conclusion that the *Gingles* factors had not been met, was seriously flawed. The flaw resulted from the premise upon which the district court operated: that the three *Gingles* factors had not been satisfied and were, in fact, unsupportive of the plaintiffs' case.

However, we find that the plaintiffs satisfied the *Gingles* test. At a minimum, satisfaction of the three *Gingles* factors shifts the burden to defendants to offer rebuttal evidence. *See Solomon*, 899 F.2d at 1035 (Tjoflat, C.J., specially concurring). No meaningful rebuttal evidence was offered, and the totality of the circumstances found in Bleckley County clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged "on account of race or color." Accordingly, the district court erred in its ultimate conclusion that the plaintiffs had not proven their § 2 claim.

Having concluded that the district court erred in failing to enter judgment for the plaintiffs, we REVERSE the district court and REMAND for the imposition of a remedy.[20]

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[20] To facilitate the devising of such a remedy in the district court, we would point out the apparent success of the Bleckley County school board districts as implemented by Georgia law and the consent decree entered earlier in this case. The remedy for the system challenged in this case could well be modeled after that plan, taking into account the particular problems and concerns of Bleckley County, as well as the requirements of the Voting Rights Act.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8306

REV. E.K. HALL, SR.; DAVID WALKER, U.S. DONALSON; RICHARD HARRIS; WILLIE ATES; REV. WILSON C. ROBERSON; NAACP CHAPTER OF COCHRAN, BLECKLEY COUNTY,

Plaintiffs-Appellants,

versus

JACKIE HOLDER, Individually and in his official capacity as County Commissioner for Bleckley County, Georgia; ROBERT JOHNSON, Individually and in his official capacity as Superintendent of Elections for Bleckley County; CHARLES KILLEBREW, Individually and in his official capacity as Mayor of the City of Cochran; LONNIE BARLOW; BEN JESSUP; C.C. GROOMS; WILLIE BASBY; BILLY RAY GODFREY, and T.C. GREER, Individually and in their official capacities as Aldermen of the City of Cochran; WILLIAM J. LUCAS, Individually and in his official capacity as Superintendent of Elections for the City of Cochran; FREDDIE WHITE; WAYNE ROGERS; WAYNE TRIPP; SONJA CURTIS, and J. LARRY WILLIAMS, Individually as in their official capacities as Members of the Bleckley County Board of Education,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed May 27, 1992)

(Opinion March 25, 1992 , 11th Cir., 19___, ___ F.2d ___).

Before: FAY and HATCHETT, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

(2)

No. 91-2012

Supreme Court, U.S.
FILED
JUL 16 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia, and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U. S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHRISTOPHER COATES
Counsel of Record
111 West Washington Street
Milledgeville, GA 31061
(912) 453-9512

LAUGHLIN MCDONALD
KATHLEEN WILDE
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Suite 202
44 Forsyth Street, NW
Atlanta, GA 30303
(404) 523-2721

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

1. Whether the decision of the court of appeals that at-large elections for the commissioner of Bleckley County, Georgia violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, was clearly erroneous?

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STATEMENT OF THE CASE

Inaccuracies in Petitioners' Statement

Petitioners' (hereinafter "Bleckley County") statement of the facts contains several inaccuracies. The Eleventh Circuit did not, as Bleckley County contends, rule that the sole commissioner form of local government in Georgia was *per se* unlawful. Petition for Writ of Certiorari, p. 3 (hereinafter "Petition"). According to Bleckley County, "[i]n Georgia there are presently 17 counties utilizing this [sole commissioner] form of local government. The Eleventh Circuit has determined this form of local government to be violative of the Voting Rights Act." *Id.* What the court of appeals actually held was that "the totality of the circumstances *found in Bleckley County* clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged 'on account of race or color.' " Appendix to the Petition 86 (emphasis added) (hereinafter "App.").

Bleckley County has also asserted for the first time in its Petition for Writ of Certiorari the question whether or not the at-large elected sole commissioner form of government may be challenged under Section 2 of the Voting Rights Act, 42 U.S.C. §1973.[1] The county never raised such issue in its answer, and acknowledged in the district court that "[t]he Eleventh Circuit in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987) applied the *Gingles* guidelines to a challenge against the single

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[1] See, Questions Presented: "1. Whether the Voting Rights Act of 1965 empowers the courts to alter local governments to ensure proportional minority representation?" Petition, p. i.

commissioner form of government." *Hall v. Holder*, Civ. No. 85-242-2-MAC (M.D.Ga.), Defendants' Proposed Conclusions of Law, p. 5, May 9, 1990.[2] Bleckley County argued further in the court of appeals that "[t]he trial court was *correct* on applying the three-part test mandated by the Supreme Court in *Gingles*, which was applied by this Court to the sole commissioner challenge in *Carrollton*." *Hall v. Holder*, No. 91-8306 (11th Cir.), Brief of Appellees, p. 21, Aug. 12, 1991 (emphasis added). Bleckley County thus conceded in both courts below that Section 2 was available to challenge the at-large elected sole commissioner form of government.[3]

While this Court has never considered a challenge to a sole commissioner form of local government on the merits, Bleckley County failed to note that in *Duncan v. City of Carrollton, Georgia, NAACP*, 485 U.S. 936 (1988), the Court refused to grant certiorari to review the decision of

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[2] As the court of appeals noted in this case, while the sole commissioner form of government "is unusual," the minority plaintiffs' claim "is not a unique challenge, however, and we have already held that § 2 challenges to sole commissioner forms of government are subject to the same analysis employed by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 . . . *Stallings*, 829 F.2d at 1549." App. 67-8. In addition to Carroll County, sole commissioner systems have been abolished in Telfair, Webster, and Wheeler Counties as a result of Section 2 litigation. Clark v. Telfair County, Georgia Commission, Civ. No. 287-25 (S.D.Ga. Oct. 26, 1988); Nealy v. Webster County, Georgia, Civ. No. 88-203 (M.D.Ga. March 16, 1990); Howard v. Commissioner of Wheeler County, Georgia, Civ. No. 390-057 (S.D.Ga. July 10, 1992).

[3] Bleckley County did not argue to the contrary in its Suggestion of Rehearing En Banc.

the court of appeals in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), which reversed the decision of a district court dismissing a Section 2 challenge to the at-large elected sole commissioner form of government in Carroll County, Georgia.

Bleckley County also claims that "[c]itizens of Bleckley County prefer the sole commissioner form of government." Petition, p. 5. Some white citizens of the county may prefer the sole commissioner form, but as this litigation demonstrates black citizens do not.

Omissions in Petitioners' Statement

Bleckley County omitted numerous facts, stated below, that are material to the consideration of the questions presented.

A. Racial Bloc Voting

The court of appeals found that "the evidence conclusively establishes a pattern of racially polarized voting in Bleckley County." App. 84-5. That evidence included:

1. County wide regression analysis data revealed that 60.8% of black voters, but only 0.9% of white voters, supported the black candidate, Rev. Jesse Jackson, in the 1984 presidential primary.[4] App. 79.

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[4] Statistical analysis was limited in this case because of the small number of black candidates for county wide offices, and because in August, 1984, the year in which respondent Hall ran for judge of probate court, the county reduced its polling places from eight to one. App. 65 n.3, 78 n.13. Regression and

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2. Exit poll data indicated that over 90% of the black electorate supported Jackson in the 1988 presidential primary, while white support was less than 2%. App. 79-80.

3. Black candidates were regularly defeated by white candidates in at-large elections for the City of Cochran, the county seat and the largest municipality in the county.[5] After elections were restructured as a result of this law suit so that the city had a majority black district, black candidates were elected as the representatives of the majority black district. App. 66 n.5, 81.

4. The only black to run in a county wide election, respondent Hall, was soundly defeated. After this law suit was brought and a single member district plan was adopted for the county board of education, Hall was elected to the board from the majority black district. App. 78 n.13, 81.

5. The 1974 Lieutenant Governor election involving J.B. Stoner, an avowed white racist, the 1966 and 1974

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homogeneous precinct analysis depend on the presence of multiple polling places, or data points. Respondents did, however, produce evidence of the results of a total of 30 elections – four county wide and 22 municipal involving viable black candidates, and four others in which race was a significant issue.

[5] The only exception was Willie Basby who was first elected under the city's plurality vote system in 1973 in a contest with two whites, getting 39% of the vote. Thereafter, Basby ran as an incumbent, or having been an incumbent.

Gubernatorial elections involving Lester Maddox, a former governor and segregationist, and the 1968 presidential election involving then-segregationist George Wallace, showed "that a substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals as late as the mid 1970's, and that they voted accordingly." App. 82.

6. "Bleckley County had enforced racial segregation in all aspects of local government and local government services until forced to change by federal legislation in the 1960's." App. 83.

7. "Bleckley County had debated and fought desegregation in all aspects of public life, continuing its resistance until as late as the early 1970's." App. 83.

8. "Local government had deprived blacks of the opportunity to participate in public life and government, even prohibiting blacks from registering to vote and from voting until well into the 1960's." App. 83.[6]

9. "[T]he black citizens of Bleckley County continue to suffer from the effects of discrimination," and their "depressed socio-economic situation 'hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process.' " App. 83.

10. There is only one polling place in the entire county (which has 219 square miles), a building in

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[6] No blacks were appointed as deputy registrar until 1984, and no blacks were appointed as poll managers until after 1986.

Cochran belonging to an all white civic club. App. 65, 83. Prior to 1984, when precincts were consolidated, there were a number of polling places "providing ready access to voters in the outlying areas of the county." App. 65 n.3.

11. Organizations in Bleckley County, which frequently serve as forums for political candidates and political discourse, are "racially exclusive" and "give blacks and whites in Bleckley County a different exposure to the candidates running for local, state, and national office." App. 84.

12. The experiences of seasoned local black politicians showed that "as a practical political matter, blacks are unable to sponsor candidates for Bleckley County's sole commissioner office because such candidacies are futile." App. 79.

13. The district court judge concluded at the end of the trial that:

> having run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county. You're going to put your hard earned time and shoe leather campaigning throughout this county . . . under these circumstances?

App. 79.

B. Geographic Compactness

Both the district court and the court of appeals found that black voters in Bleckley County are sufficiently numerous and geographically compact to constitute a majority in a single member district. App. 75.

C. Political Cohesion

The court of appeals found that "the record evidence . . . coupled with the existence of racially polarized voting, conclusively reveal that the *Gingles* requirement of political cohesiveness has been satisfied." App. 85.

D. The Totality of Circumstances

The court of appeals held that respondents had satisfied the test for proving a violation of Section 2 prescribed by the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that at a minimum the burden was shifted to the county to offer rebuttal evidence, and that "[n]o meaningful rebuttal evidence" was offered. App. 86. The court also concluded that "the totality of the circumstances found in Bleckley County clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged 'on account of race or color.' " *Id.*

Finding a violation of Section 2, the court of appeals reversed and remanded "for the imposition of a remedy." App. 86.

SUMMARY OF ARGUMENT

The court of appeals held only that the use of the at-large elected sole commissioner system based on "the totality of the circumstances *found in Bleckley County* clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged 'on account of race or color.' " App. 86 (emphasis added). The Georgia counties that still use the sole commissioner system (17

out of 159) will not, therefore, be directly affected by the decision in this case, unless minorities in those counties can demonstrate that the systems deny or abridge the equal right to vote on the basis of race or color within the meaning of Section 2.

Bleckley County seeks to raise an issue which it never presented to either of the courts below, *i.e.*, whether the sole commissioner form of government can be challenged under Section 2. The petition should be denied for this reason. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This Court has recently reiterated that the Voting Rights Act, including Section 2, "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991). The Court has also rejected in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), the claim, virtually identical to the one Bleckley County has attempted to raise here, that Section 2 was unavailable to challenge the method of electing so-called "single-member offices."

The court of appeals properly determined the existence of racial bloc voting by considering the totality of the circumstances existing in Bleckley County. In small rural counties such as Bleckley election data and the opportunities for purely statistical analysis will necessarily be limited. *Thornburg v. Gingles*, 478 U.S. 30, 57 n.25 (1986).

The findings of the court of appeals that voting was racially polarized and that Section 2 had been violated were based upon correct legal standards, and were not

clearly erroneous. *Thornburg v. Gingles, supra*, 478 U.S. at 79.

REASONS THE PETITION SHOULD BE DENIED

I. The Issues Are not Substantial

Bleckley County erroneously states that the court of appeals invalidated the sole commissioner form of government in the 17 (out of 159) counties in Georgia which utilize it. The court did not. It held only that the use of the at-large elected sole commissioner system based on "the totality of the circumstances *found in Bleckley County* clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged 'on account of race or color.' " App. 86 (emphasis added). The counties that still use the sole commissioner system will not be directly affected by the decision in this case, unless minorities in those counties can demonstrate that the systems deny or abridge the equal right to vote on the basis of race or color within the meaning of Section 2.

Having misstated and exaggerated the holding of the court of appeals, Bleckley County also seeks to raise an issue which it never presented to and was never addressed by either of the courts below, *i.e.*, "Whether the Voting Rights Act of 1965 empowers the courts to alter local governments to ensure proportional minority representation?" Petition, p. i.[7] In both lower courts Bleckley

[7] The claim that the decision of the court of appeals ensures "proportional minority representation" is entirely a

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County conceded that Section 2 and the analysis in *Thornburg v. Gingles*, 478 U.S. 30 (1986), applied to challenges against the single commissioner form of government. In the court of appeals, moreover, the county defended the decision of the district court, and argued that it "was correct on applying the three-part test mandated by the Supreme Court in *Gingles*." Brief of Appellees, p. 21. Having failed to raise the question below whether Section 2 can be used to challenge the at-large elected sole commissioner form of government, Bleckley County should not be allowed to assert it here.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals "is not properly before us"). This is not a case in which exceptional circumstances exist, or are even

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red herring. The court of appeals never used such language, nor did it require that minorities be proportionately represented. It simply found a Section 2 violation, reversed the district court and remanded the case "for the imposition of a remedy." App. 86. Congress has provided that plaintiffs *are* entitled to a remedy for the violation of their rights under Section 2, one which "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S.Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). Although the court of appeals indicated that a remedy "could well be modeled after" the plan for the board of education, no remedy has yet been imposed, and thus the issue whether any remedy the court might impose complies with the Voting Rights Act is not before the Court. App. 86 n.20.

urged, for relaxation of the rule. *Stone v. Powell*, 428 U.S. 465, 481 n. 15 (1976). Relatively few jurisdictions in the state use the sole commissioner system, and as noted *supra*, at n.2, several jurisdictions have recently abandoned their systems for a board of commissioner form of government, the predominant form of county government in the state. Thus, this case does not present an issue that is either important or of general application that needs to be resolved by this Court, particularly in the absence of any analysis by the lower courts.

Even if Bleckley County's contention went to the jurisdiction of the trial court, and is thus noticeable at any time, *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981), it would still be without merit. The sole commissioner system is the ultimate form of at-large elections. In jurisdictions where voting is racially polarized the sole commissioner system, coupled with the state's existing majority vote requirement, means that blacks could never have the equal opportunity to elect candidates of their choice to the legislative and executive branches of county government. It is difficult to believe that such a closed and racially exclusive system of elections could ever be deemed wholly insulated from challenge under Section 2.

This Court has recently reiterated that the Voting Rights Act, including Section 2, "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991) (applying Section 2 to the method of electing judges). The Court has also rejected in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), the claim, virtually identical to the one Bleckley County has attempted to raise here, that Section

2 was unavailable to challenge the method of electing so-called "single-member offices." In *Houston Lawyers' Association* the state argued that the at-large method of electing trial court judges was immune from Section 2 challenge because the judges were single-member office holders, *i.e.*, they exercised their jurisdiction independently and throughout the counties from which they were elected. The Court rejected the argument.

> It is equally clear, in our opinion, that the coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected. If a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act. . . . Exempting elections for single-member offices from the reach of § 2 altogether can therefore not be supported.

111 S.Ct. at 2380-81.

Bleckley County's claim that the method of electing its county commissioner is beyond the reach of Section 2 is similarly without merit, and does not present a substantial issue for review by this Court.

II. The Court of Appeals' Finding of Racial Bloc Voting Was not Clearly Erroneous

Bleckley County argues that the court of appeals misapplied *Thornburg v. Gingles, supra*, by "[e]xamining the issue of racial bloc voting under the totality of the circumstances existing in Bleckley County." Petition, p. 15. More specifically, the county claims that it was error

for the court of appeals to consider: (1) the fact that "blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government;" (2) the testimony of seasoned local black politicians "that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County;" (3) the fact that blacks were elected in Cochran after the city adopted district elections; (4) the levels of support in the county for racist or pro-segregation candidates (J. B. Stoner, Lester Maddox, and George Wallace); and, (5) socio-economic disparities and the history of segregation in the county. Petition, pp. 16, 18-9. To the contrary, the court of appeals correctly followed the decision of this Court.

A. Non-Statistical Evidence May Prove Racial Bloc Voting

Gingles was a challenge to six multi-member house and senate districts for the North Carolina general assembly and involved 14 counties, including the major metropolitan counties of Mecklenburg, Durham, and Wake. Given the large populations and number of jurisdictions involved, the plaintiffs were able to collect and evaluate data from 53 general assembly primary and general elections involving black candidacies over a period of three different election years. 478 U.S. at 35 ns.1 & 2, 52-3. Because of the number of jurisdictions and precincts, the *Gingles* plaintiffs were also able to make extensive use of homogeneous precinct and ecological regression analysis in examining the elections for the existence of polarized voting.

In small counties such as Bleckley election data and the opportunities for statistical analysis will necessarily be more limited than in *Gingles*. In addition, since precincts were consolidated in 1984 it has become impossible to do regression or homogeneous precinct analysis in Bleckley County, while the sole commissioner system has operated in such a discriminatory manner that it has prohibited or discouraged blacks from even running for the office.

In recognition of facts such as these, and to insure that Section 2 be given "the broadest possible scope," *Chisom v. Roemer, supra*, 111 S.Ct. at 2368, particularly in jurisdictions with the most dilutive election systems, *Gingles* provides that "[w]here a minority group has never been able to sponsor a candidate, courts *must* rely on other factors [than elections] that tend to prove unequal access to the electoral process." 478 U.S. at 57 n.25 (emphasis supplied).[8] Moreover, where the minority has begun just recently to sponsor candidates, "the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." *Id.*[9]

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[8] The "sponsored candidates" language of the court of appeals, to which Bleckley County objects as being "directly contrary to the *Gingles* mandate," Petition, p. 16, was, of course, taken verbatim from *Gingles* itself.

[9] Respondents believe footnote 25 in *Gingles* means at least two things: (1) racial bloc voting may be proved by factors other than election data; and, (2) where racial bloc voting cannot be shown because, for example, a system is so discriminatory that the minority has never participated in elections as

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The *Gingles* requirement that where election data is sparse or unavailable a court must look at other factors in determining the existence of polarized voting, or access to the electoral process, is simply a restatement of pre-existing voting rights case law which was incorporated into Section 2 by the 1982 amendments of the Voting Rights Act. As this Court noted in *Gingles*, 478 U.S. at 44 n.8, "amended § 2 was designed to restore the 'results' test – the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*." Cases cited in the Senate Report as illustrative of the results standard were *White v. Regester*, 412 U.S. 755 (1973), *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), and nearly two dozen other appellate court decisions applying a totality of circumstances analysis to claims of minority vote dilution. 478 U.S. at 36 n.4, 44 n.8; S.Rep. No. 417, 97th Cong., 2d Sess. 23 n.79 (1982); Voting Rights Act Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary United States Congress Second Session on S.53, S.1761, S.1975, S.1992, and H.R. 3112, 97th Cong., 2d Sess. 1216-26 (1982) (listing and analyzing the appellate court decisions).

One of the appellate court decisions applying the results test incorporated into Section 2 by Congress was

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voters or candidates, or where the evidence is simply sparse, a Section 2 violation can still be established by proof that the minority is denied equal access to the electoral process based upon the totality of circumstances identified in the legislative history of Section 2. See, S.Rep. No. 417, supra, at 29. As the court of appeals found, the evidence in this case "conclusively establishes a pattern of racially polarized voting." App. 84-5. Apart from that, the totality of circumstances support a violation of the equal access standard of Section 2 identified in footnote 25.

Nevett v. Sides, 571 F.2d 209, 223 n. 18 (5th Cir. 1978) (relying upon *White v. Regester*, *supra*, and *Zimmer v. McKeithen*, *supra*). Voting Rights Act Hearings, *supra*, at 1221. *Nevett* held that under a "results" analysis a court may determine the presence or not of racial bloc voting based upon the totality of circumstances existing in a given jurisdiction, including the history of segregation and the defeat of qualified black candidates. According to the court:

> Bloc voting may be indicated by a showing . . . of the 'existence of past discrimination in general . . . , large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.' . . . Of course, bloc voting may be demonstrated by more direct means as well, such as statistical analyses, . . . or the consistent lack of success of qualified black candidates.

Accord, United States v. Marengo County Commission, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984) ("[w]e have stated that '[b]loc voting may [also] be indicated by a showing under *Zimmer* of . . . past discrimination in general . . . or by 'the consistent lack of success of qualified black candidates' ").

Under Section 2 results analysis few black candidacies are both evidence of, and a response to, polarized voting. In *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984), for example, the court held that "the lack of black candidates is a likely result of a racially discriminatory system." Other courts applying the results test have reached similar conclusions that a

depressed level of minority candidacies is evidence of polarization. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113, 1119-20 1135 (E.D.La. 1986); *Jeffers v. Clinton*, 730 F.Supp. 196, 213 (E.D.Ark. 1989); *Hendrix v. McKinney*, 460 F.Supp. 626, 632 (M.D.Ala. 1978) (racial bloc voting "undoubtedly discourages black candidates because they face the certain prospect of defeat"); *Wilkes County, Ga. v. United States*, 450 F.Supp. 1171, 1174 (D.D.C. 1978) (finding polarized voting based on aggregate vote totals and the fact that "there have been very few black candidates for office").[10]

Bleckley County is incorrect in saying that the court of appeals erred in taking into account the fact that black candidates were elected in municipal elections after the City of Cochran adopted districts. The county's error is in thinking that how elections *actually work* is irrelevant in determining if voting is racially polarized. The fact that blacks consistently lose in county and city elections at-

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[10] While the plurality in *Gingles* indicated that "only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis," 478 U.S. at 68, all the elections relied upon by the Court in finding racial bloc voting were black-white contests, in which the race of the candidate was necessarily taken into account. 478 U.S. at 80-3. Lower courts have interpreted *Gingles* as meaning that "the race of the candidate is in general of less significance than the race of the voter – but only within the context of an election that offers voters the choice of supporting a viable minority candidate." Citizens for a Better Gretna v. City of Gretna, La., 834 F.2d 496, 502 (5th Cir. 1987). Accord, Campos v. City of Baytown, Texas, 840 F.2d 1240, 1245 (5th Cir. 1988). As for the all white contests in Bleckley County that did not offer voters the choice of supporting a viable minority candidate, they are of little use in determining the existence of racially polarized voting.

large, but win in county and city elections from majority black districts, is highly relevant evidence that voting is along racial lines. In *Lodge v. Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981), the court of appeals, in making a finding that voting was racially polarized in Burke County, Georgia, found it "of particular significance . . . that in the one city election in which city councilmen were elected from single-member districts, a Black was elected." The court of appeals' finding that voting was polarized was expressly affirmed by this Court *sub nom. Rogers v. Lodge*, 458 U.S. 613, 623, 627 (1982), in which the Court applied the *White v. Regester* totality of circumstances analysis. *Also see, Jackson v. Edgefield County, South Carolina*, 650 F.Supp. 1176, 1198 (D.S.C. 1986) (the success of black candidates in local district elections "confirmed the political unity of each racial group and the cohesiveness of its voting behavior").

The testimony of experienced local politicians is also highly relevant under Section 2 in showing the existence or not of racial bloc voting. In *Gingles* itself the Court relied not only upon statistical analysis, but "the testimony of lay witnesses" to prove that voting was racially polarized. *Gingles v. Edmisten*, 590 F.Supp. 345, 367 (E.D.N.C. 1984), *aff'd sub nom. Thornburg v. Gingles, supra*, 478 U.S. at 41. Other courts have similarly considered lay testimony in determining the presence of racial bloc voting. *See, e.g., Carrollton Branch of NAACP v. Stallings, supra*, 829 F.2d at 1558 (polarized voting can be established "through the clearly acceptable means of a bivariate regression analysis and the testimony of lay witnesses"); *McDaniels v. Mehfoud*, 702 F.Supp. 588, 593

(E.D.Va. 1988) ("[r]acially polarized voting can be established through both anecdotal evidence and electoral analysis"); *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002, 1013 (D.Mont. 1986) ("[t]he testimony of observers of Big Horn County politics confirms that it is racially polarized"); *Sierra v. El Paso Independent School District*, 591 F.Supp. 802, 807 (W.D.Tex. 1984) (racial bloc voting may be shown by "lay testimony from . . . practical politicians who are thoroughly familiar with voting behavior"); *Jackson v. Edgefield County, South Carolina School District, supra*, 650 F.Supp. at 1198 ("[e]ven more persuasive to the Court than the experts' quantitative analysis of polarization on voting behavior is the testimony by the local politicians who, through their participation in the political processes, have the direct observation and are familiar with the voting practices and voting patterns in Edgefield County").

Gingles and the other decisions embodying the results standard adopted by Congress hold that the kind of evidence presented by respondents in this case to prove the existence of racial bloc voting is relevant and must be considered, particularly where election data is sparse or unavailable. The court of appeals applied correct legal standards, standards which have been consistently applied by this Court and the lower federal courts in vote dilution cases. Based upon the evidence, the court of appeals' finding that voting in Bleckley County was racially polarized is not clearly erroneous. *Thornburg v. Gingles, supra*, 478 U.S. at 79 (the clearly erroneous standard

"is the appropriate standard for appellate review of a finding of vote dilution").[11]

CONCLUSION

The petition presents no important or unsettled issue. The court of appeals correctly followed *Gingles*, and its decision is consistent with those of other lower courts. Review is not warranted; the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTOPHER COATES
Counsel of Record
111 West Washington Street
Milledgeville, GA 31061
(912) 453-9512

LAUGHLIN MCDONALD
KATHLEEN WILDE
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Suite 202
44 Forsyth Street, NW
Atlanta, GA 30303
(404) 523-2721

Attorneys for Respondents

[11] There is no merit to the county's argument that the court of appeals should have remanded the case to the district court for correction of error. Petition, p. 21. A reviewing court may properly make a finding of liability where, as here, "the record permits only one resolution of the factual issue." Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982).

Supreme Court, U.S.
FILED
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No. 91-2012

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACKIE HOLDER, ET AL., PETITIONERS

v.

REV. E. K. HALL, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the practice of electing a single county commissioner may be invalidated as dilutive under Section 2 of the Voting Rights Act of 1969, 42 U.S.C. 1973.

2. Whether the court of appeals applied the correct legal standard in finding that racially polarized voting had been demonstrated.

3. Whether the court of appeals should have remanded the issue of racial polarization to the district court rather than deciding that issue itself.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Since its creation in 1912, Bleckley County, Georgia, has had a sole-commissioner form of government. Pet. App. 4. The commissioner has exclusive legislative and executive power, and is elected by a majority vote of all voters in the county. *Id.* at 65; see Ga. Code Ann. § 36-5-22.1 (Michie 1987). In 1985, a referendum on adopting a multimember-commission form of government for Bleckley County was defeated. Pet. App. 9; see 1985 Ga. Laws 4406.

The voting age population in Bleckley County is 19% black and 80% white. Voter registration levels for blacks

and whites are about 70% for each group. Pet. App. 64-65. No black has ever run for the office of county commissioner. *Id.* at 78.

2. In 1985, respondents filed suit in federal district court against Bleckley County's commissioner and its superintendent of elections (petitioners herein). Pet. App. 66. Respondents alleged that Bleckley County's practice of electing a sole commissioner violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Pet. App. 66.

After a bench trial, the district court found for petitioners. Pet. App. 2-61. Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court found that respondents could satisfy the first *Gingles* precondition—*i.e.*, the requirement that the plaintiff group be sufficiently numerous to constitute a majority of a single-member district—if the number of county commissioners were increased to six. Pet. App. 12, 55.

The court found, however, that respondents had failed to satisfy the second and third *Gingles* preconditions. Pet. App. 33-55. In reaching that conclusion, the court held that "plaintiffs may not rely upon socio-economic or other barriers as specific evidence that voting in the community is racially polarized." *Id.* at 50. Instead, the court indicated that statistical evidence of actual voting behavior "is *all* the court has or can have" to support a finding of racial polarization. *Ibid.*; see also *id.* at 51 & n.45.

The court noted that respondents had not produced such evidence for local elections. Pet. App. 33. While respondents had offered statistical data on the 1984 and 1988 Presidential primaries involving Jesse Jackson, the court found that evidence insufficient to prove a pattern of polarized voting. *Id.* at 37-46, 50-51. The court therefore concluded that respondents had failed to satisfy the third *Gingles* precondition—that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. *Id.* at 51.

For essentially the same reasons, the court found that respondents had also failed to satisfy the second *Gingles* precondition, *i.e.*, that blacks are politically cohesive. Pet. App. 52-55. The court concluded that respondents' failure to establish two of the *Gingles* preconditions was fatal to their Section 2 claim. Pet. App. 55-56.

Nonetheless, the court went to consider other factors relevant to the totality of the circumstances under Section 2. In particular, it found that "Bleckley County's black community yet suffers the indignities associated with a proportionally poorer socio-economic status" (Pet. App. 58), and that this status "hinders the ability of blacks to participate in the Bleckley County political process," particularly in light of "the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area." *Id.* at 7 & n.3. The court also found that "[t]here appear also to have been problems in the past with regard to low black representation among workers at the election polling place." *Id.* at 53.

On the other hand, the court found that "there is no [candidate] slating process to stand as a barrier to minority participation." Pet. App. 59. The court also found that respondents had failed to prove that the single-commissioner form of government was unresponsive to minority voters or that the policy underlying it was "tenuous." *Ibid.* Under the totality of the circumstances, the court concluded that respondents' claims "must fail." *Id.* at 59-60.[1]

3. The court of appeals reversed. Pet. App. 62-86. Relying on its prior decision in *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988), the court held that a challenge to the practice of electing a sole commissioner

[1] The district court also rejected respondents' constitutional claims, finding no evidence that the practice of electing a sole commissioner had been adopted or maintained with discriminatory intent. Pet. App. 23-28.

is "subject to the same analysis" as that employed in *Gingles*. Pet. App. 68. Applying this analysis, the court agreed with the district court that respondents had satisfied the first *Gingles* precondition by showing that blacks could constitute a majority of the electorate in one of five single-member districts. *Id.* at 74 & n.10. The court explained that it is "appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." *Id.* at 74.

The court further held that the district court had been "operating under a misconception of the law" when it found that respondents had failed to establish racially polarized voting. Pet. App. 76. The court explained that it is appropriate to consider a wide variety of evidence in addition to statistical electoral data in determining whether there is racially polarized voting. *Id.* at 77. After considering all of the relevant evidence, including the inability of blacks to sponsor a candidate for commissioner, the available statistical and electoral data, the testimony of black political leaders, the fact that a significant number of Bleckley County voters had supported segregationist candidates in the past, the county's history of enforced racial segregation, and the district judge's observation that "[h]aving run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county" (*id.* at 79), the court of appeals found that the evidence "conclusively" established both white bloc voting and minority political cohesiveness. *Id.* at 78-85 & n.18; see also *id.* at 64 n.2. Accordingly, the court reversed the district court's contrary findings as clearly erroneous. *Id.* at 85.

Turning to the totality of the circumstances, the court of appeals concluded that "the totality of the circumstances found in Bleckley County clearly reveal[s] a situation where the electoral power of Bleckley County

blacks has been abridged 'on account of race or color.'" Pet. App. 86. Accordingly, the court held that respondents had proved a violation of Section 2.[2]

DISCUSSION

1. Petitioners are correct in contending (Pet. 22) that "[t]he Voting Rights Act of 1965 does not empower the courts to subdivide a jurisdiction to ensure proportional representation." More generally, in our view, the Section 2 results test is not violated by a well-settled practice of electing only one official to an office in a particular geographical area.

a. Section 2 provides that "[n]o * * * standard, practice, or procedure shall be imposed or applied * * * in a manner which results in a denial or abridgement of the right * * * to vote on account of race or color." 42 U.S.C. 1973(a). The practice of electing a single official to an office in a particular geographic area—*i.e.*, the use of a true "single-member office"—is clearly a "standard, practice, or procedure" within the meaning of Section 2, and thus elections to such offices are within the coverage of Section 2.

The fact that Section 2 applies to cases involving single-member offices does not mean, however, that the practice of utilizing such offices may be invalidated on the ground that it results in vote dilution. Section 2 requires only that the existing political processes be "equally open to participation by members of" all racial groups. 42 U.S.C. 1973(b). The Section 2 results test is violated only if the challenged electoral practice operates to deny a racial group its right to vote "on account of race or color" by causing that group to have "less opportunity than other members of the electorate to participate

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[2] Having found a violation of Section 2, the court of appeals did not reach respondents' constitutional claims. Pet. App. 68 n.6.

in the political process and to elect representatives of their choice." 42 U.S.C. 1973(a) and (b).[3]

The practice of electing only one official to an office in a particular geographic region does not deprive any minority racial group of an equal opportunity to participate and elect "on account of race or color"; under the single-member office structure of government, it is the group's small size, not its race, that prevents it from achieving a greater measure of electoral success. To be sure, the practice of electing only one official from a particular area may mean that minority groups—whether racial, religious, political, or socio-economic—will be unable to achieve electoral success, but that does not mean that they are being unfairly denied an equal opportunity to participate in the political process. It is inherent in the very nature of our majoritarian democratic political system that numerical minorities lose elections, and Section 2 was not intended to invalidate that democratic system. See *Whitcomb* v. *Chavis*, 403 U.S. 124, 153-155 (1971).[4] Accordingly, the practice of utilizing a single-

[3] The requirement that a denial or abridgement of the right to vote be "on account of race or color" appears in subsection (a) of Section 2, while the results test itself is set forth in subsection (b). It is clear, however, that the results test invalidates only those electoral practices that result in a denial of equal political opportunity "on account of race or color" (or, in the case of language minorities, "because" of the plaintiff's membership in a language minority, 42 U.S.C. 1973b(f)(2)).

[4] *Whitcomb* v. *Chavis* was decided before the enactment of the Section 2 results test, and it involved a claim of vote dilution under the Constitution rather than under Section 2. Nonetheless, it is controlling with respect to the proper interpretation of Section 2 as well, because Congress clearly intended to adopt the standards enunciated in *Whitcomb*, *White* v. *Regester*, 412 U.S. 755 (1973), and similar cases when it amended Section 2 in 1982. See S. Rep. No. 417, 97th Cong., 1st Sess. 20-21, 22-23, 32 (1982) [hereinafter *Senate Report*]; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 97 (1986) (O'Connor, J., concurring in judgment).

member office does not violate Section 2, because it does not result in the denial of equal political opportunity on account of race.

b. Absent unusual circumstances, moreover, a construction of Section 2 that permitted federal courts to mandate an increase in the number of officials elected to an office for the purpose of enhancing the electoral power of particular racial groups would be impermissible for another reason as well: it would run afoul of Congress's decree that "nothing in this section [2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b). To explain why that is so, it is necessary to consider the standards generally applicable to vote dilution claims under Section 2.

In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court announced three preconditions applicable to claims that the use of an at-large districting scheme results in vote dilution in violation of Section 2.[5] Those preconditions require a plaintiff group to demonstrate that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

In her opinion concurring in the judgment in *Gingles*, Justice O'Connor demonstrated that the majority's test

[5] *Gingles* applied its preconditions to all claims that at-large electoral schemes deny plaintiffs an equal opportunity to *elect* representatives, but left open the questions whether Section 2 permits a claim that plaintiffs have been denied an equal opportunity to *influence* election results and, if so, what standards are applicable to such a claim. 478 U.S. at 46 n.12. For the reasons set forth in our briefs *amicus curiae* in *Growe* v. *Emison*, No. 91-1420, at 8-12, and *Voinovich* v. *Quilter*, No. 91-1618, at 15-16 & n.9, we believe that the three *Gingles* preconditions are applicable to so-called "influence" claims as well.

would, if construed to require a finding of a violation merely upon proof of the three preconditions set forth above,[6] create "what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups." 478 U.S. at 91 (O'Connor, J., concurring in judgment). As she explained, the majority's test would therefore "come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 94.[7]

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[6] In our view, proof of the *Gingles* preconditions is not in itself sufficient to make out a claim of vote dilution; plaintiffs must also offer evidence of the totality of the circumstances in order to prove a violation of Section 2. See U.S. Br. *amicus curiae* in *Growe* v. *Emison*, No. 91-1420, at 8; see also 42 U.S.C. 1973(b) (violation of results test established only if "it is shown" "based on the totality of circumstances"); *Senate Report* 27 ("*Plaintiffs * * * must show* that the challenged system or practice, *in the context of all the circumstances* in the jurisdiction in question, results in minorities being denied equal access to the political process.") (emphasis added). The lower courts, however, are divided over the question whether plaintiffs must offer any evidence beyond proof of the three *Gingles* preconditions. Compare, *e.g.*, Pet. App. 73 & n.9; *Concerned Citizens* v. *Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990); *Solomon* v. *Liberty County*, 899 F.2d 1012, 1017, 1035 (11th Cir. 1990) (en banc) (concurring opinions), cert. denied, 111 S. Ct. 670 (1991); with, *e.g.*, *East Jefferson Coalition* v. *Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991); *Monroe* v. *City of Woodville*, 881 F.2d 1327, 1330 (5th Cir. 1989); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989), aff'd, 111 S. Ct. 662 (1991).

[7] We agree with Justice O'Connor that permitting proof of the three *Gingles* preconditions alone to establish a violation of Section 2 would be inconsistent with Congress's rejection of a proportional representation regime. That is particularly true if the *Gingles* plurality's definition of racially polarized voting, which permits a finding of racial polarization even where factors other than race account for the appearance of polarized voting, were to be accepted. See 478 U.S. at 61-74 (opinion of Brennan, J.). A number of lower courts have accepted that definition, further increasing the likelihood that Section 2 will in effect be applied to require roughly proportional representation. See, *e.g.*, *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d at 1557-1558; *Solomon* v. *Liberty County*, 899 F.2d at 1035 n.12 (Tjoflat, J., specially concurring); *Campos* v. *City of Baytown*, 696 F. Supp. 1128, 1136 (S.D. Tex. 1987), aff'd in pertinent part on other grounds, 840 F.2d 1240 (5th Cir. 1988); *NcNeil* v. *City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill. 1987), mandamus denied, appeal dismissed, 818 F.2d 565 (7th Cir. 1987); cf. *Collins* v. *City of Norfolk*, 816 F.2d 932, 935-936 (4th Cir. 1987); *Overton* v. *City of Austin*, 871 F.2d 529, 538 n.9 (5th Cir. 1989). We continue to believe that defendants should be permitted to show that factors other than race explain an apparent pattern of white bloc voting. See generally U.S. Br. *amicus curiae* in *Thornburg* v. *Gingles*, No. 83-1968, at 30 n.57. That question was left open in *Gingles*. See 478 U.S. at 100 (O'Connor, J., concurring in judgment); *id.* at 82 (White, J., concurring).

It is readily apparent that the court of appeals' reasoning in this case, if expanded beyond its narrow context, would exacerbate even further the problems identified by Justice O'Connor in her *Gingles* concurrence. Under the court of appeals' logic, plaintiffs could effectively nullify the first *Gingles* precondition by claiming that the defendant jurisdiction's practice of electing too few officials to the particular office at issue was responsible for the plaintiff group's inability to form a majority in a single-member district. For example, if the plaintiff group sought to challenge a city's practice of electing its five council members at large, but the plaintiff group was not sufficiently large or geographically compact to constitute a majority in one of five single-member council districts, the plaintiffs could simply claim that the city's failure to elect seven—or ten, or fifty—council members was a dilutive "practice" in violation of Section 2.[8]

[8] To be sure, the court of appeals in this case expanded the number of officials elected to a single-member office rather than the number of members of a multimember body, but the court did not expressly limit its rationale to the single-member office context. See Pet. App. 74. In any event, there is no principled basis under Section 2 for limiting claims of this type to the context of single-member offices; if plaintiff groups are entitled to have five county

If the first *Gingles* precondition could be automatically evaded in that manner, it would cease to have any meaning at all. See *Romero* v. *City of Pomona*, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989). The result would be that plaintiff groups could prove a violation of Section 2 merely by showing that they were politically cohesive—as is frequently the case—and that their preferred candidates usually lost elections.[9] Short of an express requirement of proportional representation, it is difficult to imagine a clearer violation of Congress's command that "nothing in this section [2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b).

c. Even if there were any remaining doubt about the proper construction of Section 2, this Court's decision in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), would counsel against a construction of the statute that requires state and local jurisdictions to increase the number of officials elected to particular offices in order to enhance the voting power of particular racial groups. In *Gregory*, the Court held that it would not "attribute to Congress an intent to intrude on state governmental functions" in the absence of a "plain statement" of congressional intent to achieve that result. 111 S. Ct. at 2406. Although it is clear that Congress intended Section 2 to invalidate a wide variety of electoral devices where those devices operate to deny racial groups equal access to the political process, there is no evidence whatsoever of any con-

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commissioners rather than one where that would enable them to achieve electoral success, why are they not equally entitled to have ten commissioners rather than five in order to achieve that same result?

[9] Such a showing would suffice at least in those courts that do not require plaintiffs to prove anything beyond the *Gingles* preconditions in order to make out a Section 2 violation and that do not permit defendants to rebut a prima facie showing of racially polarized voting by proving that factors other than race explain the appearance of polarization. See notes 6, 7, *supra*.

gressional intention to intrude still further into state and local government structures and require changes in the number of office-holders elected to a particular office. Moreover, in *Minnesota State Senate* v. *Beens*, 406 U.S. 187, 196-200 (1972), this Court rejected the proposition that the equitable powers of a federal court were sufficiently broad to require a major change in the size of a state legislative body even as a remedy for a *constitutional* violation. *Beens* made clear that, in general, "[s]ize is for the State to determine," *id.* at 200, and Congress did not purport to overturn that judgment when it amended Section 2 in 1982.

A broad interpretation of the decision below would call into question the practice of electing single state governors and attorneys general, city mayors, county sheriffs, coroners, and prosecutors, and a wide variety of other officers in jurisdictions in which there is racially polarized voting. It would no doubt be possible for defendants in some of those cases to defend successfully against a Section 2 challenge by showing that the governmental interest in maintaining the existing system outweighed the plaintiffs' showing of vote dilution. See, *e.g.*, *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976); *Senate Report* 29. But the government's interest in preserving a particular challenged practice will not invariably outweigh a showing of dilution (*Houston Lawyers*, 111 S. Ct. at 2381), and thus it is likely that a significant number of these existing single-member offices would be restructured into multimember bodies as a result of (or in order to avoid the risks and expense of) voting rights litigation. Nothing in the language or legislative history of Section 2 suggests that Congress intended such a result.

d. Respondents err in contending (Br. in Opp. 11-12) that *Houston Lawyers' Ass'n* v. *Attorney General of*

Texas, 111 S. Ct. 2376 (1991), supports the conclusion that courts may increase the size of governmental bodies. *Houston Lawyers* was not a true single-member office case at all. Rather, it involved a traditional challenge to an at-large multimember electoral scheme—in particular, the at-large election of multiple county judges on a county-wide (or wider) basis, *with each judicial electoral district electing more than one judge*. *Id.* at 2378-2379. Thus, the single-member office principle provided no defense under those circumstances, because that principle, properly understood, "only applies to a narrow category of elected offices: ones for which the electoral district cannot be subdivided because only one official is elected from a geographic region." U.S. Br. *amicus curiae* in *Houston Lawyers*, Nos. 90-813 and 90-974, at 15; see generally *id.* at 12-17. *Houston Lawyers* thus provided no opportunity for the Court to consider whether Section 2 permits federal courts to increase the number of officials elected to an office in order to enhance the electoral power of a particular racial group, and it did not even purport to decide that question.[10] Accordingly, *Houston Lawyers* sheds no light on the question at issue in this case.[11]

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[10] Indeed, *Houston Lawyers* did not even purport to decide whether the electoral scheme before it was invalid under Section 2. The only question before the Court in that case was whether Section 2 "applies to the election of trial judges in Texas" (111 S. Ct. at 2378) even though judgeships may be characterized as "single-member offices" in the sense that judges exercise independent decision-making authority. *Id.* at 2380. As noted above, the judgeships at issue in Texas were not true single-member offices because each judicial district elected multiple judges through at-large voting. Moreover, as we explained in our brief in *Houston Lawyers*, each judge "ha[d] the same authority and exercise[d] the same responsibility," and "each district court within each county is interchangeable with every other office." 90-813 & 90-974 U.S. Amicus Br. at 15-16.

[11] This Court's decisions under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, also do not undermine the conclusion that the practice of electing one official to a particular office is not itself a

e. At least one other court of appeals has reached the conclusion that single-member offices cannot be challenged under the Section 2 results test, albeit it in a different context. In *Butts* v. *City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986), plaintiffs challenged a New York law requiring run-off primary elections if no candidate received 40% of the vote for mayor and other citywide single-member offices. The court held that the challenged law did not improperly dilute the votes of minorities because dilution principles governing elections to multimember bodies do not apply to single-member offices, in which "[t]here can be no equal opportunity for representation within an office filled by one person." 779 F.2d at 148. When elections are held for a multimember body, a minority group has the opportunity to secure "a share of representation" equal to that of other groups by electing members from districts in which the minority is dominant. But because "there is no such thing as a 'share' of a single-member

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violation of the Section 2 results test. To be sure, the Court has held that changes in the size of a legislative body constitute changes in a "standard, practice, or procedure" with respect to voting for purposes of Section 5. See *Lockhart* v. *United States*, 460 U.S. 125, 131 (1983); see also *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 828 (1992). But the inquiry under Section 5 is quite distinct from that under the Section 2 results test; Section 5 looks to whether the challenged change has the "purpose" or will have the "effect" of denying or abridging the right to vote on account of race. 42 U.S.C. 1973c. The "effects" prong of Section 5 requires that a proposed change in election laws not lead to a "retrogression" in the electoral strength of a particular racial group. *Lockhart* v. *United States*, 460 U.S. 125, 134 n.10 (1983); *Beer* v. *United States*, 425 U.S. 130, 141 (1976). But retrogression alone does not suffice to establish a violation of Section 2. See *Senate Report* 68 n.224; see generally U.S. Br. *amicus curiae*, in *Thornburg* v. *Gingles*, No. 83-1968 at 17 n.39. Thus, while a change in the number of officials elected to an office from a particular geographic area may violate the "purpose" or "effect" prong of Section 5 (or for that matter the intent prong of Section 2), it generally will not violate the results test.

office," the Second Circuit stated, vote dilution theory cannot be applied to such offices. *Ibid.*[12]

There is also tension between the decision below and the decisions of other courts of appeals in cases involving challenges to multimember bodies. A number of courts have expressly rejected the proposition that the size of multimember bodies may be increased where necessary in order to permit plaintiff groups to satisfy the first *Gingles* precondition. See *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 946-947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Romero* v. *City of Pomona*, 883 F.2d at 1425 n.10; see also *Overton* v. *City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) (Jones, J., concurring).

Nonetheless, we do not believe that further review of this issue is warranted at this time. In the first place, the decision below arises in an unusual context—a single county commissioner who exercises total legislative and executive power over an entire county—and it is too early to say whether the Eleventh Circuit will apply the reasoning of the decision below beyond its context in a manner that creates a direct conflict with the decisions of other circuits. Indeed, there is reason to believe that the decision below may be limited to its facts: the Eleventh Circuit has previously implied that traditional single-member executive offices would be immune from challenge under Section 2 even though single-member offices that combine executive and legislative power may be successfully challenged. *Dillard* v. *Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987). If the Eleventh Circuit were to adopt such a rule, it would minimize the extent of the

[12] In *Butts*, the court of appeals held that a plurality vote requirement for a single-member office was not subject to Section 2 challenge. 779 F.2d at 151. In our view, the *method* of electing candidates to a single-member office is not immune to attack; hurdles to success other than the single-member structure may be challenged in appropriate cases.

circuit conflict and limit the significance of this case to a few counties in Georgia.[13]

Moreover, this case does not provide a desirable vehicle for addressing the full range of legal issues raised by the single-member office issue. Petitioners apparently did not raise most of the legal arguments discussed above in the lower courts, nor do they raise them in their petition. Instead, petitioners focus primarily on their contention that the court of appeals erred in increasing the size of the county commission "to ensure proportional minority representation." Pet. 9; see Pet. 12, 21, 22-23. As we explained above, it is true that the reasoning of the court of appeals, if extended beyond its narrow context, would likely amount to a requirement of roughly proportional representation, but the court certainly did not expressly apply such a requirement, as petitioners contend. Thus, even if this Court were to accept petitioners' preferred legal standard and remand to the court of appeals for application of that legal standard to the facts of this case, the court of appeals might well reach the same result.

This Court has already denied a petition for a writ of certiorari in a case presenting precisely the same question at issue here. See *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988). Under the circumstances, we see no reason for the Court to adopt a different course in this case.

2. Petitioners also contend that the court of appeals erred in its treatment of the issue of racially polarized voting. Pet. 13-22. That contention does not warrant this Court's review.

[13] Outside of Georgia, there are no counties in the United States that have sole county commissioners; all have multimember bodies of one sort or another. *1987 Census of Governments*, Vol. 1, No. 2: Government Organization; Popularly Elected Officials [GC87(1)-2] (January 1990). According to petitioners, only 17 of the 159 counties in Georgia elect a sole commissioner. Pet. 3.

a. The court of appeals properly concluded that non-statistical evidence is relevant in deciding whether there is racially polarized voting. To be sure, when statistical evidence of voting patterns is available, it usually provides the best indication of whether the minority group is politically cohesive and whether the majority usually votes sufficiently as a bloc to defeat the minority's preferred candidate. Courts are not limited to considering statistical evidence in deciding these critical issues, however.

In this case, the relevant local elections were not susceptible of regression analysis because they were held in a single precinct. Pet. App. 25, 33 n.22. The only election that could be analyzed statistically was the 1984 presidential primary involving Jesse Jackson, and exit polling data were available only for the 1988 presidential primary. *Id.* at 75-76, 78 n.12. Both courts below agreed that the evidence from these elections was insufficient to determine whether voting patterns in Bleckley County are racially polarized. *Id.* at 76. In these circumstances, the court of appeals was clearly correct in concluding that respondents could rely on non-statistical evidence to show that voting in Bleckley County is polarized.

Gingles itself makes this clear. In that case, this Court stated that "the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." 478 U.S. at 57 n.25. In such cases, "courts must rely on other factors that tend to prove unequal access to the electoral process." *Ibid.*

b. Petitioners contend, however, that none of the evidence cited by the court of appeals is probative of racially polarized voting. Pet. 16-19. That contention is without merit. All the evidence discussed by the court of appeals was relevant to the question whether voting in Bleckley County is racially polarized. See Fed. R. Evid. 401.

The evidence that no black candidate has ever run for commissioner is one such relevant factor. Pet. App. 78.

That circumstance is more likely to exist in a community in which there is polarized voting than in one in which there is not. See *McMillan* v. *Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984). Similarly, the court properly deemed relevant testimony from black political leaders that it would be futile for a black candidate to run. Pet. App. 78-79. The observations of those who participate directly in the political process and have leadership experience can be relevant in determining whether voting is racially polarized. *Sanchez* v. *Bond*, 875 F.2d 1488, 1493-1494 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990); *Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d at 1558. In *Gingles* itself, the district court's finding of polarized voting, although based primarily on statistical evidence, was "supplemented to some degree by the testimony of lay witnesses." 478 U.S. at 41.

Another relevant circumstance is that black candidates have consistently lost local elections when whites have constituted a majority of the electorate, but have won when blacks have been in the majority. Pet. App. 81. As petitioners suggest, it is theoretically possible that black and white voters preferred the same candidates in these elections. Pet. 18. A factfinder could reasonably conclude, however, that this pattern is further evidence that black voters in Bleckley County generally prefer black candidates, while white voters generally prefer white candidates. *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984); *Nevitt* v. *Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978); *Lodge* v. *Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981), aff'd, 458 U.S. 613 (1982).

It is also of some relevance that candidates for state and national office who ran on racist themes received significant support in Bleckley County. Pet. App. 82. Petitioners argue that it is impossible to know whether the support for these candidates came from whites or blacks. Pet. 18. But surely a court may infer that a candidate

who has espoused white supremacy is more likely to have received his support from white voters than from black voters.

Finally, the history of discrimination in Bleckley County is also pertinent here. Pet. App. 82-84. Polarized voting is more likely to be found in a community in which there has been a history of discrimination than in one in which there has been no such history. *Marengo County*, 731 F.2d at 1567 n.34; *Nevett*, 571 F.2d at 223 n.18.

3. Petitioners contend (Pet. 21-22) that if the district court applied an improper standard in deciding the issue of polarization and failed to consider all the relevant evidence, the court of appeals should have remanded to the district court rather than deciding the issue itself. Pet. 21-22. In *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982), this Court held that once a court of appeals identifies a legal error in the district court's approach to a factual issue, it should generally remand to the district court to decide that issue under the proper legal standard. A court of appeals may decide the issue itself, however, when "the record permits only one resolution of the factual issue." *Id.* at 292.

The court of appeals applied that standard here. It resolved the polarization issue itself only after determining that "the evidence conclusively establishes a pattern of racially polarized voting in Bleckley County." Pet. App. 84-85. That fact-intensive determination affects only the parties to this case, and does not raise a question of broader significance. Accordingly, the court of appeals' fact-bound decision to resolve the issue of racial polarization rather than remand it to the district court does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

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No. 91-2012

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In The

Supreme Court of the United States

October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U. S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, AND NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

R. NAPIER MURPHY
Counsel of Record
MURPHY & SIBLEY
Post Office Box 4104
Macon, Georgia 31208
(912) 742-8300

W. LONNIE BARLOW

Counsel for Petitioners

CHRISTOPHER COATES
Counsel of Record
111 West Washington Street
Milledgeville, Georgia 31061
(912) 453-9512

LAUGHLIN MCDONALD
KATHLEEN WILDE
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.

Counsel for Respondents

Petition For Certiorari Filed June 16, 1992
Certiorari Granted March 1, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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03/01/93	Order of the Supreme Court of the United States Granting the Defendants' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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Supreme Court of the United States

No. 91-2012

Jackie Holder, etc., et al.

Petitioners

v.

E. K. Hall, Sr., et al.

ORDER ALLOWING CERTIORARI. Filed March 1, 1993.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted limited to the following question: "Whether the Court of Appeals erred in holding the governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973."

March 1, 1993

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No. 91-2012

In The

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October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONERS

R. NAPIER MURPHY
Counsel of Record
MURPHY & SIBLEY
Post Office Box 4104
Macon, Georgia 31208
(912) 742-8300

W. LONNIE BARLOW
Post Office Box 618
Cochran, Georgia 31014-0618
(912) 934-9463

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under §2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973.

PARTIES TO THE PROCEEDING

The caption contains the name of all current parties to the proceeding. Respondents initially challenged the manner of electing the Bleckley County Board of Education and the Cochran City Council, but those claims were settled prior to trial, leaving only the claim against Petitioners that was tried in the district court.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

On March 25, 1992 the Eleventh Circuit reversed the district court's judgment in favor of Petitioners, and on May 27, 1992 denied Petitioners' Suggestion of Rehearing En Banc. The Eleventh Circuit's opinion is reported at *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992) and the

district court's opinion is reported at *Hall v. Holder*, 757 F.Supp. 1560 (M.D. Ga. 1991).

Both opinions are reprinted in the appendix to the Petition for Writ of Certiorari at App. 2 and App. 62.

JURISDICTION

The opinion of the Eleventh Circuit was entered March 25, 1992. Petitioners filed a Suggestion of Rehearing En Banc on April 14, 1992 which was denied May 27, 1992. A Petition for a Writ of Certiorari was brought to this Court within ninety (90) days of the opinion of the Eleventh Circuit, as required by Supreme Court Rule 13.1.

Review was sought pursuant to 28 U.S.C. § 1254(1) (1988) since Petitioners asked the Court to review the decision of the Court of Appeals entered March 25, 1992.

The Petition for a Writ of Certiorari was granted by this Court March 1, 1993.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1973 (1988)

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

STATEMENT OF THE CASE

Respondents, minority citizens of Bleckley County, Georgia, filed this lawsuit on July 17, 1985, claiming that the single county commissioner form of government in Bleckley County violates Section 2 of the Voting Rights Act of 1965. Named as defendants were Petitioners – the current sole commissioner of Bleckley County and the Superintendent of Elections for Bleckley County. After a trial, the district court ruled for Petitioners, concluding that the single commissioner system was not intended to harm the interests of minorities and did not result in a denial or abridgment of voting rights under Section 2. The Eleventh Circuit reversed, holding that Section 2 was

violated because it was possible to create a wholly different, multi-district system with one "safe" minority seat.

There are currently fourteen counties in Georgia using a single commissioner form of government. Bleckley County has used this system since its creation in 1912. *See* Bleckley, County of Creation, No. 355, 1912 Ga. Laws 38-41. The county was created from territory then comprising a part of Pulaski County. The city of Cochran was designated as the county seat. In the act creating Bleckley County, it was recognized that the voters of the county would elect one Commissioner of Roads and Revenues. Including the current commissioner, Jackie Holder, there have been seven county commissioners. Mr. Holder has been the county commissioner since 1976. Since 1912, no minority has ever run for this office.[1]

The county is 219 square miles, and its only town is Cochran. The county has a population of 10,767, of which 22% is black. The majority of Bleckley County citizens, including blacks, live in Cochran.[2]

The county commissioner has the exclusive legislative and executive authority in the county, pursuant to

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[1] In addition to having only one County Commissioner, Bleckley County has also one Sheriff, Probate Judge, Clerk of Superior Court, Tax Commissioner, Coroner, School Superintendent, County Surveyor and Magistrate, each of whom is elected by a majority of all the voters in Bleckley County. (Tr. 59-63).

[2] The Eleventh Circuit noted that since the trial, the 1990 census has become available. It reveals that Bleckley County's population has decreased to 10,430. The black population has decreased proportionately smaller than the white population, thereby causing Bleckley County to have a slightly increased percentage of blacks. 955 F.2d at 1565 n.1.

O.C.G.A. § 36-5-22.1, applicable to all 159 counties in Georgia, regardless of the number of commissioners. He is elected by a majority vote of all voters in the county, pursuant to the state election code, applicable to all local governments in Georgia. *See* O.C.G.A. § 21-2-501.

As testified to by Mr. Holder, the duties of the commissioner in Bleckley County are primarily administrative rather than legislative. The only office over which he has direct supervision of hiring and firing is the Road Department. (Tr. 497). In regard to other county departments, Mr. Holder handles the advertising for employment openings, but Mr. Holder gives the applications to the particular elected official whose office has the opening, for his recommendation. (Tr. 496-97). The county makes efforts to recruit and hire minorities. (Tr. 498).

When the county commissioner has a policy decision to make, he advertises and holds a public hearing. (Tr. 503). He also advertises the proposed budget for the county. (Tr. 516). He conducts a regularly scheduled monthly meeting. (Tr. 503).

The primary responsibilities of the commissioner are roads and bridges and managing the county on a day-to-day basis. The commissioner sets the millage rate for the county for the fiscal year, makes appointments to boards and serves on boards. Mr. Holder has appointed a black to the Board of Tax Assessors, Hospital Authority, Recreation Commission and the Health Board.(Tr. 795, 499-500). Minorities have also been appointed to serve on the Board of Family and Children's Services, Heart of Georgia Regional Development Center and Library

Board. (Tr. 500-1). The Chief Tax Appraiser for Bleckley County has been a black female. (Tr. 498).

Bleckley County has programs available for white and black citizens including a malnutrition center, maternal indigent care, a public transportation service, and an ambulance. (Tr. 516-17). The county also has a new Human Services Center where the Headstart and senior citizens programs are located. (Tr. 519).

The voting age population in Bleckley County is 19% black and 80% white. However, the voter registration level for blacks and whites is approximately 70% for each group.

In 1986, subsequent to the filing of this lawsuit, a referendum was held, in accordance with legislation enacted by the Georgia General Assembly, on the issue of whether the county should adopt a six-member county commission plan. Bleckley County – Board of Commissioners; Created; Referendum, No. 292, 1985 Ga. Laws 4406-11. The legislation proposing the Board of Commissioners was rejected by Bleckley County voters, and the sole commissioner form of government was retained by a vote of 1156 to 887. Status of Referendum Elections for the Years 1953-1986, 1987 Ga. Laws CLXXXII, CCLXXII.

There was very little organized interest or support in the black community in regard to the 1986 referendum to change the county government.[3] There was no evidence

[3] City Councilman Willie Basby, a black citizen and the councilman from Cochran's majority black city council district, testified there was very little interest or organized effort in the black community regarding the 1986 referendum. (Tr. 320-21).

in the record to support the allegation of the respondents that this 1986 referendum was conducted to maintain the sole commissioner form of government for racially discriminatory reasons.The Bleckley County Grand Jury recommended the referendum because there was dissatisfaction in the county about a tax increase.[4]

Bleckley County citizens prefer the sole commissioner form of government for the county because it is less expensive than a multi-member board, the county is small, the commissioner is accessible and responsive. It is an extremely efficient way to administer a small county.[5]

Respondents offered no evidence that the county commissioner has ever been unresponsive to the needs of minorities.[6] Indeed, the sole commissioner is the representative of the entire county, black and white, elected at-large and responsible to all voters. While it may be old-fashioned, it is the simplest, most pure and economical

[4] Dr. Bernadette Loftin, historian and resident of Bleckley County, testified that the referendum was prompted by voter dissatisfaction over a millage increase only. There was no racially discriminatory reason for the referendum. (Tr. 597).

[5] While the districting plan allowing a multi-member commission to govern Bleckley County was rejected in the 1986 referendum, only four years earlier Bleckley County voters had approved a five-member district plan for the election of the Bleckley County School Board. (Tr. 157).

[6] In a January 25, 1984 article from The Cochran Journal, black City Councilman Willie Basby stated in reference to whether the county should abandon the sole commissioner system, "[l]arger counties obviously need a commission, but one person could be good for small counties if he's an active man and deals with all the people." (Plaintiffs' Ex. 41). *See* 757 F.Supp. 1560 at 1564 (M.D. Ga. 1991).

form of efficient government for a small county. And it is one person, one vote on the most fundamental level.

As to local elections, there is no candidate slating process in Bleckley County. (Tr. 514; Tr. 392). There have been no county commissioner elections in which racial appeals to voters were made. (Tr. 514).

Although Respondents claim alleged barriers to voting, especially prior to the Civil Rights Act of 1964 and related legislation, the testimony of Respondents' lay witnesses established there have been no barriers to blacks registering to vote or voting in Bleckley County from at least 1964 to the present. (Tr. 58, 94; Tr. 259-60; Tr. 267, 286; Tr. 315-16).

Black voter registration in Bleckley County has steadily increased since 1964. The proportion of the black voting age population registered in 1988 was essentially equal to or greater than the proportion of the white voting age population registered to vote. These statistics further reveal blacks comprise approximately 19% of the voting age population and approximately 19% of the actual registered voters in Bleckley County. *Hall v. Holder*, 757 F.Supp. 1560 at 1562. As such, alleged past discrimination in Bleckley County and alleged disparities in education, housing and income do not presently hinder blacks from registering and participating in Bleckley County politics.[7]

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[7] Although Respondents made much reference at trial to the educational system in Bleckley County *prior to desegregation*, there is only one school system in Bleckley County, and blacks and whites share only one elementary school, one middle school and one high school. (Tr. 492). The schools are fully integrated. There are no private schools in Bleckley County. (Tr. 501).

Using the guidelines established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) the district court determined that Respondents could satisfy the first *Gingles* precondition, that is, that the minority voters are geographically compact to constitute a majority in a single-member district, only if the local government were increased from a county commission of one officeholder to six officeholders.

The district court further determined, however, that Respondents had not satisfied their burden of proof regarding the second and third *Gingles* preconditions, that is, political cohesiveness and racial bloc voting. The only statistical evidence in this case relied upon by the respondents related to the two presidential campaigns of Jesse Jackson in 1984 and 1988.[8] The 1984 campaign was analyzed through regression analysis and a so-called homogeneous precinct analysis. An exit poll conducted at the time of the 1988 Jackson election was the only analysis of that election. *See* 757 F.Supp. at 1565-67.[9]

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[8] The county electorate votes at-large, in only one polling place in the city of Cochran. As such, regression analysis is not available. A number of polling places were previously available throughout Bleckley County, but these precincts were consolidated shortly after the 1984 presidential primaries. Despite the existence of only one precinct, school board members are not elected in an at-large election. Instead, the multi-member board is elected from five single-member districts. This is accomplished in the sole precinct setting by assigning the voters from each district to specified voting machines that correspond to their district. 955 F.2d 1739 n.3,4.

[9] The district court noted the political campaigns of the Reverend Jackson may in reality yield aberrant information if

Respondents' expert, Dr. Richard Engstrom, testified the statistical evidence alone provided little evidence from which a court could conclude that racially polarized voting exists in Bleckley County. (Tr. 440-41, 483).

While Respondents did not analyze any county commissioner elections, Petitioners did perform a regression analysis on the 1980 and 1988 votes cast for Petitioner Holder in the county commissioner elections and a determination of racially polarized voting could not be made. (Tr. 669-673).

As to other elections analyzed, black candidate Robert Benham received the votes of both white and black voters in Bleckley County in 1984 for the Georgia Court of Appeals. (Tr. 37-388). Judge Benham received over half of his votes from white voters. (Tr. 467).

In City of Cochran elections, black candidate Willie Basby won three at-large elections for city council against white opposition. He won twice by receiving a majority of the votes cast.[10] 757 F.Supp. at 1568.

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one seeks to determine sustained voting patterns in Bleckley County or in any other jurisdiction for that matter, citing *Citizens for a Better Gretna v. Gretna*, 636 F.Supp. 1113 (E.D. La. 1986) *aff'd*. 834 F.2d 496 (5th Cir. 1987), *cert. denied* 488 U.S. 1002 (1989). 757 F.Supp. at 1576, n.30.

[10] Respondents argue that given the racial demographics of Bleckley County, it would be necessary for a candidate, who is supported by black voters, to receive substantial white voter support in order to win a sole commissioner race. City Councilman Willie Basby testified that personal voter contact, name recognition and consensus building win elections in Bleckley County. In his opinion white voters would not discriminate against a qualified black candidate. (Tr. 313; 316-318).

The district court observed:

> It appears that the testimony of Councilman Basby serves less as evidence of racially polarized voting and more as a lesson in the dynamics of grass roots political campaigning. Nothing in the plaintiffs' evidence drawn from elections for local office leads this court to a conclusion that voting on local levels is racially polarized. 757 F.Supp. 1573-1574.

The State Election Code of 1964 requires a majority vote for all state and county elections in Georgia. O.C.G.A. § 21-2-501. As such, the county commissioner is elected by majority vote. However, no evidence was introduced to show that any candidate preferred by minority voters has been adversely affected by the majority vote requirement. No black candidate has ever run in a primary or general election in Bleckley County for the county commissioner post.

The district court found that the respondents, while meeting the first *Gingles* precondition of compactness *if* the number of county commissioners were increased to six, had failed to satisfy the second and third *Gingles* preconditions. The district court held that the respondents had failed to prove that blacks are politically cohesive, and further that the respondents had failed to establish that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate.

Nonetheless, the district court considered the other factors relevant to the "totality of circumstances" test under Section 2. S.Rep. No. 417, 97th Cong. 1st Sess. (1982). After thoroughly reviewing the so-called Senate factors, the trial court determined:

> While plaintiffs' inability to present sufficient credible evidence drawn from local elections does not foreclose a vote dilution claim, the inability to present credible evidence supportive of the factors to be considered under the Act does foreclose a successful one in the case *sub judice*. Under any standard, under any reasonable test, considering every piece of credible relevant evidence and all factors, plaintiffs' challenges to Bleckley County's single member commission must fail. 757 F.Supp. at 1583-84.

The Eleventh Circuit reversed. Relying primarily on *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988), the court of appeals held that the sole commissioner was subject to the same analysis as that employed by this Court in *Gingles*. The court of appeals further determined that the respondents had satisfied the first *Gingles* precondition merely by showing that blacks could constitute a majority of the electorate in an expanded five single-member district form of government for Bleckley County. In the court's words, it is "appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." 955 F.2d at 1569.

The Eleventh circuit went on to evaluate the evidence and determined it established both white bloc voting and minority political cohesiveness. Accordingly, the court of appeals reversed the district court and remanded the case for imposition of a remedy.

SUMMARY OF ARGUMENT

1. Under Section 2, the inquiry is whether the existing system results in minority members having a less opportunity to participate and to elect representatives of their choice. This statute does not state, however, that electoral success is the measure of equal opportunity to participate. Section 2 is not intended to insure that numerical minorities win elections and there has never been an intent by Congress to set aside a form of government so that minority voters will automatically be able to elect minority candidates. This is specifically set forth in the proviso of Section 2(b) that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988).

The practice of electing only one official to an office in a political subdivision, such as Bleckley County, does not deprive the minority group of an equal opportunity to participate and to elect. It does not and cannot result in vote dilution. Assuming the officeholder is not the candidate of choice of minority voters, it is the group's small size, 22% of the population and 19% of the voting age population, that prevents it from electing the representative of its choice.[11]

2. Assuming a single-member office is subject to Section 2 analysis, the Eleventh Circuit has transgressed

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[11] Petitioners' expert witness, Dr. John Wilgen, testified that in 1980 and 1988 elections for county commissioner, there was no indication of any difference in racial preferences for the election of Mr. Holder. (Tr. 660).

the mandate of Congress that Section 2 does not establish a right of a minority class to proportional representation. This was done by analyzing Bleckley County vote dilution not within the existing single-member structure, but within a wholly different, hypothetical county commission system of five members, not one.

This Court in Gingles, held that three necessary preconditions must be proven in a Section 2, vote dilution case:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates. . . . Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests. . . . Third, the minority must be able to demonstrate the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed. . . . – usually to defeat the minority's preferred candidate.

478 U.S. at 50-51.

In light of these preconditions and the clear language of Section 2, the mere fact that a hypothetical commission of five districts, one majority black, may be drawn in Bleckley County does not in any way establish a Section 2

violation. If it did, plaintiffs would never lose a vote dilution case and proportional representation would be guaranteed.

The reasoning of the Eleventh Circuit thus authorizes a remedy for alleged vote dilution, before the necessary three preconditions have been proven. Vote dilution must be measured against the number of positions in the existing structure, not some hypothetical model based upon whatever size is necessary to accomplish proportional representation. To hold otherwise would cause a voting rights violation where none presently exists because a political structure could be divided or subdivided to insure that a minority, however small, could at least constitute a majority in a single member district. Conceivably city councils could consist of twenty members, with a majority black single-member district, a majority Hispanic single-member district, a majority Asian single-member district, a majority female single-member district.

3. This Court has held in previous cases that Section 2 should not be construed to require state and local governments to increase the number of officials elected to offices in the political structure in order to enhance the voting power of particular minority groups. *See Gregory v. Ashcroft*,___U.S.___, 111 S.Ct. 2395 (1991). Such is a function of state government. While Congress in Section 2 has prohibited electoral devices which operate to deny equal access to participation and election of candidates preferred by minority voters, it did not provide that federal courts are empowered to require changes in local government by increasing the number of officeholders. In the present case the Eleventh Circuit has suggested a 500%

increase in the size of local government in Bleckley County in order to ensure a majority black single-member district, which would be roughly proportional representation for the one-fifth black population.[12]

ARGUMENT

I. THE SECTION 2 RESULTS TEST IS NOT VIOLATED BY THE WELL-SETTLED PRACTICE OF ELECTING ONLY ONE OFFICIAL TO AN OFFICE IN A PARTICULAR GEOGRAPHIC AREA.

Section 2 of the Voting Rights Act of 1965 as amended in 1982 states in subsection (a) that no standard, practice or procedure shall be imposed which "results" in a denial or abridgment of the right of any citizen to vote on account of his race or color. Subsection (b) further provides that subsection (a) is violated if, based on a totality of circumstances, it is shown that the political processes leading to election in the political subdivision are not "equally open" to participation by members of the protected class. That is, the challengers to the system must show that the members of the protected class have "less opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C.

[12] Moreover, implementation of such a plan will result in a retrogression of minority influence. See *Beer v. United States*, 425 U.S. 130 (1976). Currently, blacks in Bleckley County have more "voice" in the election of a single commissioner than they would by having only one elected representative among five commissioners.

§ 1973(b) (1988). The statute limits the evidence which may be relied upon by plaintiffs by stating that the extent to which members of a protected class have been elected may be considered, however, the statute does not establish a right to have members of the protected class elected in numbers equal to their proportion in the population.

Section 2 as amended in 1988 was intended to codify the "results" test which the Supreme Court relied upon in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and in *White v. Regester*, 412 U.S. 755 (1973).

Whereas previously members of a racial minority alleging impairment of their voting strength were required to prove that the challenged structure, such as the sole commissioner system, was created or maintained with a discriminatory purpose and led to discriminatory results, under the "results" test challenging parties may simply prove discriminatory [illegible] or vote dilution without proving any discriminatory [illegible]ent or purpose. Yet, no right to proportional representation is guaranteed under Section 2 as amended in 1988.[13]

Cases which have come before this Court have concerned multi-member systems. The challenged structure

[13] The district court determined that plaintiffs failed to provide any evidence that Bleckley County's single county commissioner structure is the product of original or continued racial animus or discriminatory intent. Thus no constitutional violation was established. 757 F.Supp. at 1571. The court of appeals held, however, that because this case established a violation of Section 2 of the Voting Rights Act, it would not reach the plaintiffs' claim of a constitutional violation. 955 F.2d at 1567 n.6.

here, however, is itself a single-member district comprised of the entire political subdivision of Bleckley County. The plaintiffs in the court below, Respondents herein, request that this political subdivision, this single-member district, be further subdivided because, they allege, it dilutes black voting strength as currently constituted. This must be proven, however, under the standards set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

This Court noted in Gingles that the Senate Report which accompanied the 1982 amendments to the Voting Rights Act limited circumstances under which Section 2 violations may be proven in three ways.

> First, electoral devices, such as at-large elections, may not be considered *per se* violative of Section 2. Plaintiffs must demonstrate that under the totality of the circumstances, the devices result in unequal access to the electoral process. . . . Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. . . . Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. 478 U.S. at 50-51; S. Rep. No. 417, 97th Cong., 1st Sess. (1982).

In fact, Section 2 contains no *per se* prohibitions against any particular type of district. *Voinovich v. Quilter*, 61 U.S.L.W. 4199 (3/2/93).

The practice of electing only one official to an office in a particular geographic region or political subdivision does not deprive any minority or racial group of an equal

opportunity to participate and elect on account of race or color. Just as electoral devices such as at-large elections are not considered *per se* violative of Section 2, the mere fact that every voter in the particular political subdivision votes for a sole officeholder does not, *ipso facto*, mean minority voters have less opportunity to participate in the election of that officeholder. It is the small size of the group of voters in the district, not its race, that prevents it from achieving a greater measure of electoral success, assuming there is proof that the minority voters are not electing the candidate of their choice.[14]

Vote dilution principles govern elections to multi-member bodies. They do not apply, however, to single-member offices in which there can be no equal opportunity for representation within an office filled by only one person. In *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) the court held that a challenge to a New York law requiring run-off primary elections for mayor and other city-wide single-member offices could not be sustained. It explained that when there are elections for a multi-member body, a minority group has the opportunity to secure a "share of representation" equal to that of other groups. However, there is no such thing as a "share" of a single-member office. By definition, a single-member officeholder is the

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[14] Petitioners do not admit that Mr. Holder or any other officeholder in a sole commissioner form of government cannot also be the representative of minority voters. Evidence in this case establishes that the winner of the election for sole commissioner is heavily dependent upon black voter support for success.

representative of all the people in his electorate, whether local, state or national.

Section 2 is not intended as a way to devise a new plan to ensure black minority electoral success. If minority citizens in the single-member district involved have as great an opportunity to vote and otherwise to participate in the political process as others, then their failure to elect candidates of their choice is simply a function of the democratic process, no different from the fate of a Democrat who consistently loses in a majority Republican district. If the district line results in a racial group being a numerical minority, that group clearly will have less opportunity than others to elect candidates. In majoritarian democracy, political minorities will always be discriminated against in some fashion. Section 2 does not protect against losing elections.[15]

The form of government in Bleckley County is the purest form of democracy for a political system. Each voter in Bleckley County has one vote for the same officeholder. All votes count equally, and the winner of

[15] While the plaintiffs did not assert a claim in their complaint seeking any ruling from the court that the majority vote requirement violates Section 2 or the Constitution of the United States, the district court did not preclude the plaintiffs from offering evidence on the majority vote requirement. The court, did not consider the majority vote requirement, however, the evidence established that no black has ever been disadvantaged in any Bleckley County election because of the majority vote requirement. (Tr. 203-04). Furthermore, the majority vote requirement was a product of the overhaul of the State Election Code in 1964, and was passed by the Georgia General Assembly for all state elections.

the election represents all of the voters having been elected by a majority of the voters. The results test in Section 2 is not violated by this very old democratic practice of electing a single officeholder. The district line of Bleckley County, the boundary of the county itself, cannot be redrawn in any fashion to create a numerical black majority.

A practice of electing only one official from a particular area will certainly mean that political minority groups will not be able to achieve electoral success, if that term is interpreted to mean election of their particular candidate or the candidate of a particular race.[16] This does not mean, however, that these minority groups are denied an equal opportunity to participate in the political process to elect that official. Nevertheless, the winner of the majority votes in a democratic system is going to win. Numerical minorities do not win elections. They do, however, participate fully.

The Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) cautioned against increasing legislative seats in proportion to increased population because it would give undue voting power to certain voters. The Court noted that the failure of ghetto residents to have legislative seats was less a function of a built-in bias than it was of the simple politics of losing elections and political defeats at the poll. As noted by the Court, " . . . typical American legislative elections are district-oriented, head on races

[16] The race of the candidate is irrelevant in a bloc voting analysis. *See Gingles*, 478 U.S. at 68.

between candidates of two or more parties. As our system has it, one candidate wins, the others lose." *Id.* at 153.

Not every minority group, whether racial, religious, political or socioeconomic, has a *right* under Section 2 to be represented. The burden of the plaintiffs is to produce evidence to support findings that the political processes *leading* to nomination in an election are not equally open to participation by the group in question. *White v. Regester,* 412 U.S. 755 (1973).

Congress did not intend under the Section 2 results test to make it easy for candidates of minority voters to be elected. The Section 2 results test is not to be construed as a replacement for hard fought political campaigning and consensus building.[17]

In Bleckley County the sole commissioner system does not violate this results test. While minority success may not be assured, the "opportunity" of minority voters to participate in the political process is exactly the same

[17] Consider the testimony of Cochran city councilman Willie Basby, a black citizen appearing as a witness for the plaintiffs below. Respondents argue that given the racial demographics of Bleckley County it would be necessary for a candidate, whether black or white, who is supported by black voters to receive substantial white voter support in order to win a sole commissioner race. Councilman Basby testified: " . . . A small town in Georgia (Cochran), you have to be known by blacks and whites to get elected for public office; therefore, you need a percentage of all black and white to get elected." (Tr. 312). Mr. Basby further testified that personal contact is the most important aspect of running for elections in Cochran and Bleckley County. (Tr. 312-318).

as white voters.[18] Opportunity to participate and ease of election are two separate matters. Section 2 is an "equal opportunity" statute, not a guarantee of election.

Furthermore, Section 2 is not designed as a remedy for past racial segregation for current socioeconomic conditions. The evidence in this case established that blacks in Bleckley County participate at a much greater level in present day Bleckley County than they did two decades ago. This is not the result of a change in the standard practice or procedure. It is the result of improved socioeconomic conditions, education and housing.[19]

[18] Of interest is the fact that no minority candidate has ever run for county commissioner. David Walker, president of the local NAACP chapter, testified, however, that a qualified black candidate for county commissioner could win. (Tr. 341).

[19] Using the 1980 black voting age population of 1,474 as a constant, the percentage of the black voting age population registered to vote was 69.74% in 1988, compared to 68.12% for whites. (Defendants' Exhibits 18 and 19). Although Respondents made much reference to alleged barriers to voting, especially prior to the Civil Rights Act of 1964 and related legislation, the testimony of Respondents' lay witnesses established there have been no barriers to blacks registering to vote or voting in Bleckley County from at least 1964 to the present. (Tr. 58, 94; Tr. 259-60; Tr. 267, 286; Tr. 315-16). Black voter registration has steadily increased since 1964. The proportion of the black voting age population registered to vote in 1988 was essentially equal to or greater than the proportion of the white voting age population registered to vote in 1986 and 1988. Blacks comprise approximately 19% of the voting age population and approximately 19% of the actual registered voters in Bleckley County. As such, any alleged past discrimination of Bleckley County or disparities in education, housing or income do not presently hinder blacks from registering and participating in Bleckley County politics.

The sole commissioner is a single-member officeholder and is the smallest political unit from which the representative is elected. There cannot be a share of this office. The office cannot be subdivided. It is, at its most fundamental, one person, one vote. If the minority is failing to elect the candidate of its choice, it is due to its numerical minority, but this in no way impedes its "opportunity" to participate.

II. IF A SINGLE MEMBER OFFICE IS SUBJECT TO SECTION 2 ANALYSIS, TO ALLOW FEDERAL COURTS TO CONSIDER VOTE DILUTION WITHIN AN EXPANDED, RESTRUCTURED FORM WILL RUN AFOUL OF CONGRESS' DECREE THAT SECTION 2 DOES NOT ESTABLISH A RIGHT TO HAVE MEMBERS OF A PROTECTED CLASS ELECTED IN NUMBERS EQUAL TO ITS PROPORTION IN THE POPULATION.

By ignoring the mandate of this Court in *Gingles* the Eleventh Circuit has eliminated the burden of proof required of Section 2 plaintiffs, and virtually ensured proportional representation. In *Gingles*, this Court announced the three preconditions plaintiffs must meet to establish the use of an at-large districting scheme results in vote dilution and a violation of Section 2. These preconditions require that a minority group demonstrate that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

Justice O'Connor, in her concurring opinion in *Gingles*, illustrated how the new three-prong test of the majority would create "what amounts to a right to *usual, roughly* proportional representation on the part of sizeable, compact, cohesive minority groups." 478 U.S. at 91. (O'Connor, J., concurring in judgment). She explained that the majority's test, finding a violation merely upon proof of the three preconditions, would "come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." 478 U.S. at 94. If the definition in *Gingles* of racially polarized voting is applied, which permits a finding of racial polarization even where causes other than race account for the appearance of polarized voting, then there is more of a likelihood of satisfying the *Gingles* preconditions.

The lower courts have been divided over the question of whether Section 2 plaintiffs must offer any evidence beyond proof of the three *Gingles* preconditions. The uncertainty of the Eleventh Circuit in this case as to the contours of *Gingles* is readily apparent in that the legal analysis used by the court is directly contrary to *Gingles*, and the evidence relied upon by the Eleventh Circuit in reaching its decision in no way establishes a Section 2 violation. As such, the lower court decision heightens Justice O'Connor's concern with the three-prong test.[20]

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[20] This same concern was expressed in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 670 (1991), by Chief Judge Tjoflat, who wrote that "even if the plaintiff relies on the objective factors (. . . the

(A) The court of appeals boot-strapped the first prong of *Gingles*, "compactness," by stating: " . . . [I]t is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." 955 F.2d at 1569. The proof of the first precondition has thus become meaningless in the Eleventh Circuit and this new test has guaranteed a Section 2 violation where none previously might have existed. All plaintiffs need prove is that they have political cohesion and their preferred candidates usually lose elections.

The Eleventh Circuit has thus determined that a challenged mechanism's practice of electing too few officials to the particular office at issue can be responsible for the minority voters alleged inability to form a majority in a single-member district. This is not the *Gingles* test.

This type of reasoning ensures that no minority will ever fail on the issue of compactness, because any division or subdivision or further subdivision of the challenged mechanism can be drawn to ensure a majority black district in proportion to its population.[21] Honorable Edith H. Jones, concurring in *Overton v. City of Austin*, 871

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totality of the circumstances), those factors or circumstances, taken as a whole, *must show that the voting community is driven by racial bias and that the challenged scheme allows that bias to dilute the minority population's voting strength.* 899 F.2d at 1030 (Tjoflat, Chief Judge, concurring).

[21] And the smaller the districts drawn for minority voters, the greater the likelihood of political cohesion, thus reducing the importance of proof of the second *Gingles* prong.

F.2d 529 (5th Cir. 1989), cautioned against this analysis, stating:

> "[Plaintiffs'] reasoning puts the cart before the horse, by authorizing a remedy for voter dilution before a violation of Section 2 has been found. Actionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model based upon whatever size is necessary to accomplish proportional representation. Adding council member districts 'would create a voting rights violation where none presently exists by enabling appellants to meet the necessary precondition of their Section 2 claim.'" *Id.* at 543, citing *McNeil v. Springfield Park District*, 851 F.2d 937 at 946 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

Not only does this reasoning violate the mandate of this Court in *Gingles*, it also amounts to a right to "usual, roughly proportional representation on the part of sizeable, compact, cohesive minority groups." 478 U.S. 30 at 91 (O'Connor, J., concurring in judgment). For instance, if a plaintiff group seeks to challenge a multi-member system of electing five members at-large, but the plaintiff group is not sufficiently large or compact to constitute a majority in one of the existing five single-member districts, then, under the Eleventh Circuit's reasoning, the court may consider the size and geographical compactness of the minority group within a restructured form of the challenged system. The court could expand the local government five-fold, as it has done in this case, to twenty-five districts. As such, proportional representation is guaranteed.

In *Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989), the court of appeals looked at a challenge to the city's at-large system for electing the mayor and four city council members. The court noted:

> "The district court properly refused to consider any plans that expanded the number of seats on the city council. If proposed districting plans with additional district seats could be considered to prove a section 2 violation, there would be no case where geographical compactness could not be demonstrated by artful gerrymandering." *Id.* at 1425 n.10, citing *McNeil v. Springfield Park District, supra.*

Bleckley County is itself a single-member district. It elects one commissioner from that single-member district. It is the smallest political unit from which the commissioner is elected. As noted in *Romero*:

> "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these *minority voters* cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." *Id.* at 1426.

(B) Similarly, the Eleventh Circuit ignored the mandate in *Gingles* that plaintiffs prove the existence of a politically cohesive minority group and the existence of

racial bloc voting, the second and third *Gingles* preconditions. 478 U.S. at 50-51.

Permitting proof of the three *Gingles* preconditions alone to establish a violation of Section 2 is inconsistent with Congress' rejection of a proportional representation scheme. This concern is particularly bothersome if the definition of racially polarized voting found in *Gingles,* which permits a finding of racial polarization even where factors other than race account for the appearance of polarized voting, is accepted. See 478 U.S. at 61-74 (opinion of Brennan, J.) Other courts have accepted this definition of racially polarized voting, making it apparent that the effect of this test is becoming not only widespread, but confusing.[22]

The Eleventh Circuit, while recognizing the requirement of proof of the three *Gingles* preconditions, went beyond them by declaring that there was nō limit in the manner in which the threshold factors could be proven. In addition to relaxing the proof of "compactness," it weakened proof of political cohesiveness and racial bloc voting.

In *Growe v. Emison,* 61 U.S.L.W. 4163 (2/23/93) this Court reversed the district court which had not applied the *Gingles* preconditions but instead proceeded directly to the "totality of circumstances" test. This Court noted:

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[22] *See, e.g., Carrollton Branch of NAACP v. Stallings,* 829 F.2d 1547 at 1557-1558 (11th Cir. 1987); *Solomon v. Liberty County,* 899 F.2d 1012 at 1035 n.12 (11th Cir. 1990) (Tjoflat, J. specially concurring).

> "Our precedent requires that, to establish a vote dilution claim with respect to a multimember districting plan (and hence to justify a super-majority districting remedy), a plaintiff must prove three threshold conditions." *Id.* at 4167.

In *Growe* there was no statistical evidence of minority political cohesiveness whatsoever. Nor was there any statistical evidence of majority bloc voting and anecdotal evidence was lacking. As such the district court was reversed and judgment entered in favor of the defendants, the Court noting:

> "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.' " *Id.* at 4168, citing *Gingles*, 478 U.S. at 46.

The Eleventh Circuit admitted that the district court's legal interpretation of the evidence in this case would support the lower court's ultimate conclusion of a failure to establish vote dilution. The court of appeals, however, stated that the district court failed to take into account the "synergistic effects" of the evidence in establishing racially polarized voting. 955 F.2d at 1570.[23]

By "synergistic effects" the Eleventh Circuit refers to a collection of anecdotal testimony by lay witnesses of

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[23] Since the district court's findings were not clearly erroneous, under Rule 52 of the Federal Rules of Civil Procedure the decision should have been affirmed by the Eleventh Circuit. The district court did exactly what the court of appeals suggests should have been done, consider the totality of the circumstances, and there was no basis for the Eleventh Circuit to reverse the judgment except to grant proportional representation to black voters in Bleckley County by subdividing the county and expanding county government five-fold.

their "belief" that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County. 955 F.2d at 1571. Further, the court focused on depressed socioeconomic conditions of blacks in Bleckley County, and the county's prior history of racial segregation as evidence of present vote dilution by the use of a single member, sole commissioner system.[24]

If all the plaintiffs in a voting rights case must ever do is prove the three *Gingles* factors by, first, utilizing a new, restructured form to prove compactness, and the second and third by using anecdotal testimony alone, then every minority group will have a right to proportional representation. Whenever minority candidates are not succeeding in at-large elections and whenever the minority is large and politically cohesive, the only explanation for the lack of success of the minority candidates would be white bloc voting.

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[24] The Eleventh Circuit also implied some concern with the location where elections are held in Bleckley County. The election for county commissioner as well as all other county elections is held in a metal building known locally as the "Jaycee Barn." It is owned by a local civic club. When the precincts were consolidated in 1984, it was with the approval of the Justice Department. The location of the Jaycee Barn is adjacent to School Board District No. 2, the majority black district, and within walking distance of many black homes, the majority of blacks in Bleckley County living in Cochran. It is also the site of the annual county fair. No evidence was introduced to show that any voter has been prevented from voting because of the site of the polling place. (Tr. 493). If any group of voters is disadvantaged by the location of the polling place, it is white voters living in outlying areas of the county.

Such an analysis affords defendants no opportunity to rebut a plaintiff's claim that the political process is closed to the minority group. Such an analysis does not guarantee equal access to the political process, but creates a right to proportional representation.

Moreover, under the logic of the court of appeals, to show vote dilution under Section 2 plaintiffs need only to claim that the challenged structure is responsible for the minority group's inability to form a majority in a single-member district, and that an enlarged government would remedy the situation. This standard of review is contrary to *Gingles* since it omits the requirement that the court independently address the issue of political cohesiveness and racial bloc voting as preconditions. The court of appeals initially recognized the proper legal standard while discussing the *Gingles* requirements:

> " . . . [T]he *Gingles* decision places a 'gloss' on the Senate Report factors, limiting the use of the factors by requiring that the three *Gingles* factors be established to prove a vote dilution claim." 955 F.2d 1568.

Yet the Eleventh Circuit then based its determination that the *Gingles* preconditions had been established on factors in no way dispositive of the issues, stating, "[t]he *Gingles* majority did not, however, limit the manner in which the threshold factors may be proven." *Id.*

For instance, the Court in *Gingles* made clear that "the race of the candidate per se is irrelevant to racial bloc voting analysis." 478 U.S. at 67. The fact that the race

of the candidate is irrelevant to a racial bloc voting analysis had been recognized by the Eleventh Circuit in *Carrollton,* wherein the court correctly interpreted *Gingles* to mean that it is the status of the candidate as the chosen representative of a particular race or group, not the race of the candidate, that is important. 829 F.2d at 1557. This interpretation of *Gingles* was also recognized by the en banc decision of the Eleventh Circuit in *Solomon v. Liberty County,* 899 F.2d 1012 (11th Cir. 1990) at 1021 n.12.

Here, however, the Eleventh Circuit's first consideration under its review of the evidence submitted on the issue of racial bloc voting was as follows:

> "Yet, blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government. . . . Lay testimony by Bleckley County's black community leaders, many of whom are seasoned politicians, revealed a *belief* that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County, primarily because of the impact of the non-Cochran vote, a vote having a substantially lower percentage of blacks." 955 F.2d at 1570-71 (emphasis added).

This focus is directly contrary to the *Gingles* instruction that "only the race of the voter, not the race of the candidate is relevant to vote dilution analysis." 478 U.S. at 68.[25]

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[25] Even assuming the race of the candidate is relevant to a vote dilution analysis, the subjective belief of the witnesses proves nothing as it is speculative and conjectural. For example, in *Sonnier v. Vinton,* 484 F.Supp. 146 (W.D. La. 1980), the court rejected evidence that "blacks . . . had a defeatist attitude and

The Eleventh Circuit erroneously gave undue weight to the subjective, speculative "beliefs" of Respondents' witnesses and the fact that no black has run for the county commissioner position in finding Respondents had satisfied the precondition of racial bloc voting. Respondents argue they could not produce statistically significant evidence of bloc voting in light of the limited number of candidates. However, since the race of the candidate is irrelevant the Eleventh Circuit allowed the Respondents once again to boot-strap proof of bloc voting.[26]

Although there were numerous and various elections that could have been analyzed by Respondents, they made the decision not to analyze *any* elections involving white candidates, and presented only statistical evidence as to campaigns of Jesse Jackson, which Respondents admitted were not sufficient to establish a consistent pattern of racial bloc voting.[27]

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did not believe that a black could ever become elected because of at-large voting," and held it "would not be sufficient to find that the political process . . . is not equally open to participation by blacks." *Id.* at 148-149.

[26] Respondents' expert, Dr. Richard Engstrom, offered opinions concerning the campaigns of Jesse Jackson solely because they involved a black candidate. He did not offer opinions concerning other elections, such as for county commissioner, that could be analyzed even though he admitted a white candidate can be the choice of black voters. (Tr. 448).

[27] Dr. Engstrom testified:

Q. Is it your opinion that in Bleckley County, Georgia, evidence establishes that there is white – there will consistently be a white bloc vote to defeat minority voters and cross-over voters?

A. That the evidence that I have looked at establishes that?

Q. Yes.

This Court recently held in *Growe v. Emison*, 61 U.S.L.W. 4163 (2/23/93) that the three *Gingles* pre-requisites continue to apply.

> "The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. . . . And the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. . . . Unless these points are established, there neither has been a wrong nor can be a remedy." *Id.* at 4168.

In *Growe* the Court determined that the *Gingles* preconditions were not only ignored but were unattainable. There was no statistical evidence of minority political cohesion or majority bloc voting. The Court noted that even anecdotal evidence was lacking. *Id.* at 4168.[28]

A. You mean based on the statistical evidence? Is that what you're asking me?

Q. Based on the evidence, the statistical evidence you have looked at?

A. I can't say that statistical evidence alone establishes that; no. (Tr. 440-41).

[28] As noted by Justice Scalia in *Growe*, *Gingles* expressly declined to resolve the applicability of the showing of compactness of a minority group under claims of a minority's inability to influence, rather than alter, election results. Neither has such claim been made in this case. *See Growe* at 4168, n.5, citing *Gingles* at 478 U.S. at 46-47, n.12.

(C) As for the existence of political cohesiveness, the Eleventh Circuit summarily dealt with the district court by stating:

> "In reviewing this *Gingles* factor, the district court essentially committed the same error that it committed in analyzing the issue of racial bloc voting. That error was further compounded because the district court evaluated the existence of political cohesiveness after concluding that there was no racially polarized voting in Bleckley County." 955 F.2d at 1573.

The court of appeals then stated that proof of racial polarization may be all that is needed in order to find cohesiveness, and that was the situation in Bleckley County. Thus a new standard was established by the Eleventh Circuit that once racial bloc voting is determined, *ipso facto* there is also proof of political cohesiveness. *Gingles*, on the other hand, requires a separate determination as to each precondition, based upon a review of the evidence.[29]

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[29] Consider for instance the testimony of plaintiff David Walker, President of NAACP Chapter of Cochran/Bleckley County, for six years, that there are differences of opinion in the black community in Bleckley County on political matters and that the black community as a whole does not vote the same way in each election. (Tr. 341-43). Consider further the testimony of Respondents' expert, Dr. Bernadette Loftin, historian, who researched this issue and determined there was no evidence of political organization among black citizens in Bleckley County. (Tr. 601). Moreover, Willie Basby, who was successful in at-large campaigns for city council in Cochran, Georgia, testified that when the 1986 referendum to change the form of county government was at issue, there was very little organized interest in the black community in the referendum. (Tr. 320-21).

With the reduced burden of proof promulgated by the Eleventh Circuit, proportional representation has become assured.

III. SECTION 2 SHOULD NOT BE CONSTRUED TO ALLOW FEDERAL COURTS TO REQUIRE STATE AND LOCAL JURISDICTIONS TO INCREASE THE NUMBER OF OFFICIALS ELECTED TO PARTICULAR OFFICES IN ORDER TO ENHANCE THE VOTING POWER OF PARTICULAR MINORITY GROUPS.

This Court stated recently in *Voinovich v. Quilter*, 61 U.S.L.W. 4199 (3/2/93), that Section 2 contains no *per se* prohibitions against particular types of districts. Rather, Section 2 focuses only on the consequences of a particular structure. Where the challenged voting scheme does not have the effect of denying a protected class the equal opportunity to elect its candidate of choice, there is no violation of Section 2.[30]

Given the fact that Respondents seek to set aside the form of government that was retained by a majority of votes cast in the 1986 referendum, it is highly relevant to the issue of political cohesiveness that there was little interest in the black community regarding the issue of whether Bleckley County should adopt a multi-member board of commissioners.

[30] The Court in *Voinovich* noted that the appellees raised an "influence-dilution" claim. The Court, however, assumed without deciding that the appellees stated a cognizable Section 2 claim. Interestingly, in *Voinovich*, the appellees contended that the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, they contended, minimized the total number of districts in which the black voters could select their candidate of choice. In

In *Voinovich* this Court was equally concerned with the intervention of the lower federal courts in state apportionment in the absence of a violation of federal law. Justice O'Connor observed:

> "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that 'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' " 61 U.S.L.W. at 4202, citing *Growe, supra,* at 4166.

Indeed, the Court in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395 (1991) advised against a construction of Section 2 that requires state and local jurisdictions to increase the number of officials elected to particular offices in order to enhance the voting power of particular groups. The Court in *Gregory* recognized that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." ___ U.S. at ___, 111 S.Ct. at 2401.

Section 2 contains no language, and there is no evidence of any intent on the part of Congress, to authorize

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Bleckley County, the respondents would have the court "pack" black voters into one district out of five, whereas their ability to "influence" the political process is arguably greater in the single-member district where they constitute one-fifth of the voting population. The respondents herein, however, have not argued their inability to "influence" elections.

federal courts to assume functions of state government to find a Section 2 violation and then to impose a remedy. Here the Eleventh Circuit has done precisely that, however, first by finding a Section 2 violation using a new, altered system as the guideline, relaxing proof of racial bloc voting and political cohesiveness, and then imposing that remedy on Bleckley County.

The proposition that federal courts may use their equitable powers to require a major change in the size of a political body, even as a remedy for a constitutional as opposed to a statutory violation, was rejected by this Court in *Minnesota State Senate v. Beens*, 406 U.S. 187, 196-200 (1972). Size of government is a function of the states, not of the federal courts.[31]

Other lower courts have warned against changing the size of local government. In *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) the court of appeals cautioned against adding seats to the local governmental body, which would create a voting rights violation where none presently existed, by enabling the plaintiffs to meet the necessary preconditions

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[31] *Houston Lawyers' Ass'n. v. Attorney General of Texas*, ___ U.S. ___, 111 S.Ct. 2376 (1991) is inapplicable to this case. In *Houston Lawyers'*, a challenge was made to the at-large multi-member election of county judges on a county-wide or wider basis. Each judicial electoral district elected more than one judge. However, *Houston Lawyers'* did not decide whether the electoral scheme was invalid under Section 2. The only question before the court in that case was whether Section 2 "applied to the election of trial judges in Texas." *Id.* at 2378.

of their Section 2 claim.[32] In the context of the sole commissioner in Bleckley County, a federal court mandate to increase local government five-fold should not be substituted for minority political organization.

[32] An expansion is not authorized by the holding in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988). As noted by the *McNeil* court, the facts of *Carrollton* are clearly distinguishable. In *Carrollton* the membership of the county commission was changed from five to three and later to one as the black voting age population rose. There was direct evidence that the single county commission form had been adopted in 1947 solely to defuse black voting strength. *McNeil*, 851 F.2d at 946. No such evidence was presented in Bleckley County, which has known no other form of local government in its eighty-year existence.

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

R. Napier Murphy
Counsel of Record
Murphy & Sibley
Post Office Box 4104
Macon, Georgia 31208
(912) 742-8300

W. Lonnie Barlow
Post Office Box 618
Cochran, Georgia 31014-0618
(912) 934-9463

Counsel for Petitioners

No. 91-2012

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In The

Supreme Court of the United States

October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia, and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U. S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF

CHRISTOPHER COATES
Counsel of Record
111 West Washington Street
Milledgeville, GA 31061
(912) 453-9512

LAUGHLIN MCDONALD
KATHLEEN WILDE
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Suite 202
44 Forsyth Street, NW
Atlanta, GA 30303
(404) 523-2721

JOHN A. POWELL
STEPHEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
132 West 43rd Street
New York, NY 10036
(212) 944-9800
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Petitioners' statement of the case goes far beyond what is necessary to resolve the question presented as framed by this Court, and instead includes matters relevant only to the merits of respondents' dilution claim. There being numerous omissions in petitioners' statement, respondents are compelled to supply the Court with what they believe is a more accurate and fuller statement of the case.

A. The Proceedings Below

Respondents are African American residents and voters of Bleckley County, Georgia and the NAACP Chapter of Cochran/Bleckley County (hereinafter "plaintiffs"). They filed this action on July 17, 1985 alleging that the at-large elected, sole commissioner form of county government had a racially discriminatory purpose and effect and resulted in the dilution of their voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments.[1] Petitioners are the county commissioner and the superintendent of elections of Bleckley County (hereinafter "Bleckley County" or "the county"). Appendix to the Petition 66 (hereinafter "App.").

Bleckley County was established in 1912. The county is in rural middle Georgia and contains 219 square miles.

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[1] The plaintiffs also challenged the district voting plan for the Bleckley County Board of Education and the method of electing the Cochran City Council. These claims were settled by consent of the parties on November 22, 1985 and July 17, 1986 respectively, and are not before the Court. Appendix to the Petition 66 n.5 (hereinafter "App.").

According to the 1990 Census, the county has a population of 10,430, of whom 2,332 (22.4%) are black. No black has ever been elected to the county commission or to any other countywide office.

Trial on the merits was held on December 4-7, 1989. At the conclusion of the evidence the district court judge stated that:

> having run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county. You're going to put your hard earned time and shoe leather campaigning throughout this county . . . under these circumstances?

App. 79; Tr. 808. Despite this bleak assessment of the opportunity for minority political participation in Bleckley County, the district court ruled for defendants on March 7, 1991, finding that plaintiffs failed to prove that voting was racially polarized, that minority voters were politically cohesive, or that their voting strength was diluted by the at-large elected, sole commissioner system in violation of Section 2. App. 51, 54-5, 60-1.

The court refused to consider whether a majority vote requirement for election of the commissioner had a discriminatory purpose or effect because the requirement was part of state law which the court held the county was powerless to change, and because litigation concerning whether or not the law violated the Voting Rights Act throughout the state was pending in another case in federal district court, *Brooks v. Miller*, Civ. No. 1:90-CV-1001-RCF (N.D.Ga.). App. 12, 27. The court dismissed plaintiffs' claim that the challenged method of elections had been adopted or was being maintained with a discriminatory purpose on the ground that there was no "specific evidence" of racial intent. App. 25.

Plaintiffs filed their notice of appeal on April 3, 1991, and on March 25, 1992 the court of appeals reversed. It held that while the sole commissioner form of government "is unusual," the plaintiffs' claim "is not a unique challenge, however, and we have already held that § 2 challenges to sole commissioner forms of government are subject to the same analysis employed by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)," *citing Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1549 (1987), *cert. denied sub nom. Duncan v. Carrollton Branch of NAACP*, 485 U.S. 936 (1988). App. 67-8.[2]

B. The Sole Commissioner

Each county in Georgia has a "governing authority." Constitution of Georgia, Art. IX, Sec. I, Para. I. The governing authority means "the board of county commissioners, the sole county commissioner, or the governing authority of a consolidated government." O.C.G.A. § 1-3-3(7). The governing authority exercises all the legislative and executive powers of county government.[3] In

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[2] In Carrollton County Branch of NAACP v. Stallings, supra, 829 F.2d at 1563, the court of appeals reversed the decision of the district court dismissing plaintiffs' challenge to the at-large elected sole commissioner form of government in Carroll County, and remanded the case with instructions to consider minority size and geographic compactness within proposed three and five member commission forms of government.

[3] Those powers include directing and controlling all the property of the county, levying general and special taxes for the county, constructing and maintaining roads and bridges, filling vacancies in county offices, examining, settling, and allowing all

Bleckley County the governing authority is a sole commissioner. No counties outside Georgia use a sole commissioner as the governing authority; all the other states use multi-member county governing bodies. *1987 Census of Governments*, Vol. 1, No. 2: Government Organization; Popularly Elected Officials [GC87(1)-2] (January 1990).

Even in Georgia the sole commissioner is an exception to the rule. The multi-member board of commissioners form of county government is overwhelmingly predominant, with a five member board being the most common size. According to a 1990 survey conducted by the Georgia Department of Community Affairs, only 17 of the state's 159 counties reported using the sole commissioner form of government. *County Government Information Catalog: 1991*, Georgia Department of Community Affairs (1991).[4] All the rest reported using a board of commissioners, the size of which ranged from three to 12 members, with 71 counties using a five member board. Since 1990 the number of sole commissioner counties has steadily declined.[5]

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claims against the county, examining and auditing the accounts of all officers of the county, making rules and regulations for the support of the poor, for the county police, and the health of the county, hiring and firing county employees, and managing the every day operations of the county. O.C.G.A. § 36-5-22.1; Tr. 495-97, 548.

[4] The counties were: Bartow, Bleckley, Catoosa, Chattooga, Cherokee, Dade, Dodge, Haralson, Heard, Lumpkin, Murray, Pickens, Pulaski, Stewart, Union, Walker, and Webster.

[5] The general assembly abolished the sole commissioner system in Cherokee County in 1989, Ga. Laws 1989, p. 4295, in Dade, Heard, and Franklin Counties in 1991, Ga. Laws 1991, pp. 3893, 3976, 4681, and in Catoosa and Murray Counties in 1992. Ga. Laws 1992, pp. 4501, 4694. In addition to Carroll County,

C. The Majority Vote Requirement

The county commissioner is nominated and elected by a majority of the votes cast. The Bleckley County Democratic party executive committee first adopted a majority vote requirement for primary elections in 1964. Pl.Ex. 250; Tr. 121-23, 249. Prior to that time nomination was by a simple plurality. Tr. 123. Party leaders, such as county chairman James S. Dykes, were firmly committed to maintaining white political control and understood the harmful impact of a majority vote requirement on black voters. Tr. 128-29, 134-35.

The general assembly also enacted in 1964 a law requiring a majority vote for nomination or election to all state and county offices. Representative Denmark Groover was a principal sponsor of the majority vote law and said that it was needed to thwart the recent increases in Negro voter registration and to make it impossible for the black "bloc vote" to elect a candidate by a plurality. Pl.Exs. 229-31; Tr. 125-26, 170, 249.

D. Attempts to Expand the Size of the Commission

In 1974, 1975, and 1983 the Bleckley County grand jury recommended that a committee be established to

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sole commissioner systems were abolished in Telfair, Webster, and Wheeler Counties as a result of Section 2 litigation. Clark v. Telfair County, Georgia Commission, Civ. No. 287-25 (S.D.Ga. Oct. 26, 1988); Nealy v. Webster County, Georgia, Civ. No. 88-203 (M.D.Ga. March 16, 1990); Howard v. Commissioner of Wheeler County, Georgia, Civ. No. 390-057 (S.D.Ga. Jan. 13, 1993). Copies of the orders in these cases are reproduced in the appendix to respondents' brief. A similar Section 2 challenge is pending in Pulaski County. Sutton v. Anderson, Civ. No. 89-58-1 (M.D.Ga.).

study the feasibility of adopting a board of commissioners for the county. Pl.Exs. 335, 379, 209; Tr. 249. In 1982, 1983, and 1984 the grand juries recommended that a referendum be held on whether to change the sole commissioner system. Pl.Exs. 132, 207; Tr. 249, 408-09.

In 1985 the general assembly enacted legislation creating a board of commissioners of Bleckley County, consisting of a chairperson elected at-large and five members elected from the five single member districts then in use for the county board of education. Ga. Laws 1985, p. 4406. The legislation was required to be approved by a majority of the voters at a countywide referendum before it could be implemented.

The referendum was held on November 4, 1986, and was defeated. App. 9. There was organized interest in the black community in support of the referendum, but it was on a small scale. Tr. 320-21. The sole commissioner, Jackie Holder, actively campaigned against the referendum. Tr. 540. He ran newspaper and radio ads urging that the sole commissioner system be maintained. *Id.* The vote was 43% in favor of the referendum and 57% against. App. 9.[6]

E. Application of the *Gingles* Factors by the Court of Appeals

The court of appeals applied the analysis of *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), in its review of the decision of the district court. In *Gingles* this Court established a three part test for determining a violation of

[6] The county contends that "Bleckley County citizens prefer the sole commissioner form of government." Brief for the Petitioners, p. 7. Some white citizens of the county may prefer it, but as this litigation demonstrates black citizens do not.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The minority must demonstrate that: (1) it is geographically compact, *i.e.*, it could constitute a majority in a single member district; (2) it is politically cohesive; and, (3) the majority votes as a bloc usually to defeat the candidates supported by the minority.[7] Bloc voting was defined as " 'a consistent relationship between [the] race of the voter and the way in which the voter votes,' . . . or to put it differently, where 'black voters and white voters vote differently.' " *Id.* at 53 n.21. The *Gingles* analysis was affirmed by this Court in *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993), and *Voinovich v. Quilter*, 113 S.Ct 1149, 1157 (1993).

1. Geographic Compactness

Both the district court and the court of appeals found that black voters in Bleckley County "are sufficiently numerous and geographically compact to constitute a majority in a single member district . . . [and] that the first *Gingles* factor has been satisfied." App. 75. The majority black single member district identified by the court of appeals was "one of the five districts currently found in Bleckley County," App. 74, referring to district 2 (65% black) of the existing plan for the county board of education.

[7] According to the Court, the other factors probative of minority vote dilution listed in the senate report which accompanied the 1982 amendments to the Voting Rights Act, S.Rep. No. 147, 97th Cong., 2d Sess. 28-9 (1982), such as the lingering effects of past discrimination, racial campaign appeals, etc. "are supportive of, but *not essential to*, a minority voter's claim." 478 U.S. at 48 n.15 (emphasis in original).

The county argued that the proper measure of size and geographic compactness should be the entire county. The court of appeals rejected this contention holding that:

> it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive.

App. 74 (emphasis in original).

2. Racial Bloc Voting

The court of appeals reversed the district court's finding of no bloc voting, concluding that it was based on a "misconception of the law," App. 77, and held that "the evidence conclusively establishes a pattern of racially polarized voting in Bleckley County." App. 84-5. The district court's error lay in considering only "raw election figures and statistical calculations," App. 75, and in refusing to consider "factors beyond election data that tend to prove unequal access to the electoral process." App. 77.

The opportunity to use ecological regression and homogeneous precinct analysis, methods used in *Thornburg v. Gingles, supra*, 478 U.S. at 52-3, was limited in this case. Few blacks have run countywide, and in August, 1984, the year in which plaintiff Rev. E.K. Hall ran for judge of probate court, the county reduced its polling places from eight to one. App. 65 n.3, 78 n.13. Statistical analysis depends on the presence of multiple polling places for data points. Plaintiffs did, however, produce evidence of the results of a total of 30 elections – four countywide and 22 municipal involving viable black candidates, and four other elections in which race was a significant issue. In making its finding of racial bloc

voting, the court of appeals relied upon this, and other, evidence as follows:

a. Countywide regression analysis revealed that 60.8% of black voters, but only 0.9% of white voters, supported the black candidate, Rev. Jesse Jackson, in the 1984 presidential primary. App. 79.

b. Exit poll data indicated that over 90% of the black electorate supported Jackson in the 1988 presidential primary, while white support was less than 2%. App. 79-80.

c. Black candidates were regularly defeated by white candidates in at-large elections for the city of Cochran, the county seat and the largest municipality in the county.[8] After elections were restructured as a result of this law suit so that the city had a majority black district, black candidates were elected as the representatives of the majority black district. App. 66 n.5, 81.

d. The only black to run for a countywide office, plaintiff Hall, was soundly defeated. After this law suit was brought and a single member district plan was adopted for the county board of education, Hall was elected to the board from the majority black district. App. 78 n.13, 81.

e. The 1974 Lieutenant Governor election involving J.B. Stoner, "an avowed white racist," the 1966 and 1974 Gubernatorial elections involving Lester Maddox, a former governor and segregationist, and the 1968

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[8] The only exception was Willie Basby who was first elected under the city's plurality vote system in 1973 in a contest with two whites, getting 39% of the vote. Thereafter, Basby ran as an incumbent, or having been an incumbent. Both the district and appellate courts characterized Basby's success as "an aberration." App. 81 n.16; Tr. 808.

presidential election involving then-segregationist George Wallace, showed "that a substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals as late as the mid 1970's, and that they voted accordingly." App. 82.

f. "Bleckley County had enforced racial segregation in all aspects of local government and local government services until forced to change by federal legislation in the 1960's." App. 83.[9]

g. "Bleckley County had debated and fought desegregation in all aspects of public life, continuing its resistance until as late as the early 1970's." App. 83.[10]

h. "Local government had deprived blacks of the opportunity to participate in public life and government, even prohibiting blacks from registering to

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[9] The segregated school available to blacks were so grossly unequal that in 1963 the state took action to terminate state funds to Bleckley County. Tr. 137. The local newspaper reported in 1963 that "the Negro schools . . . have been condemned for several years." Pl.Ex. 244; Tr. 249. Public housing was built on a racially segregated basis. Although no longer segregated by law, Happy Hill Homes, built in the 1950s as a black project, has never had a white resident. Tr. 68. Even the bookmobile in Bleckley County was Jim Crow. Pl.Ex. 56; Tr. 408-09.

[10] In 1960, representative Ben Jessup took out a political ad addressed "To the White Voters of Bleckley County" promising to vote for the continuation of racial segregation. Pl.Ex. 20; Tr. 408-09. Mr. Jessup is now a member of the city council of Cochran. The board of education adopted the position in 1965 that "racial integration of school students . . . [was] morally and socially wrong." Pl.Ex. 260, Tr. 249. After passage of the Civil Rights Act of 1964, Cochran closed its city pool and paved it over with bricks. Tr. 64. Schools in Bleckley County were not desegregated until 1970, and only after the Department of Health, Education, and Welfare notified the county that its federal funds were being terminated. Pl.Ex. 274; Tr. 144, 249.

vote and from voting until well into the 1960's." App. 83.[11]

i. "[T]he black citizens of Bleckley County continue to suffer from the effects of discrimination," and their "depressed socio-economic situation 'hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process.' " App. 83.[12]

j. "[T]he 'personal preferences' of Bleckley County's citizens has resulted in racially exclusive organizations," including churches, civic clubs, and social

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[11] Plaintiff Roberson first tried to register in Bleckley County in 1955 when he moved there to teach in the city schools. He went to the courthouse, the only place where registration was permitted, but the chief of police escorted him outside. "No niggers register in this courthouse," the chief informed him. Tr. 55. Roberson complained about the incident to his school superintendent, but the superintendent told him, "just don't push the issue." Tr. 57. The following year someone burned a cross in Roberson's yard. Tr. 73. Roberson did not try to register again until 1964. At the time the Voting Rights Act was passed in 1965, only 45 blacks (3% of the black voting age population) were registered to vote in Bleckley County. Long after passage of the act some blacks were "afraid" to register at the courthouse. Tr. 338. Black voter registration did not increase significantly until 1984 when satellite registration was first allowed. Tr. 110, 279-80, 335-36. No blacks were appointed as deputy registrars until 1984, and no blacks were appointed as poll managers as late as 1986. Tr. 337, 277-78. Blacks filed a lawsuit in 1988 challenging continuing discrimination in the appointment of poll workers and managers in Bleckley County. NAACP of Cochran/Bleckley County v. Bleckley County, Civ. No. 88-32-MAC (M.D.Ga.).

[12] Black voter turnout is lower than white voter turnout. Tr. 321; Pl.Ex. 390; Tr. 321, 490.

clubs. App. 83-4.[13] These organizations, which frequently serve as forums for political candidates and political discourse, "give blacks and whites in Bleckley County a different exposure to the candidates running for local, state, and national office." App. 84.[14]

k. The sole precinct system serves as "a further barrier to active political participation by blacks." App. 83. There is only one polling place in the entire county – the Jaycee Barn in Cochran, which belongs to the Jaycees, an all white civic club. App. 65, 83.[15] Prior to 1984, when precincts were consolidated, there were a number of polling places "providing ready access to voters in the outlying areas of the county." App. 65 n.3.

l. The experiences of seasoned local black politicians showed that "as a practical political matter, blacks are unable to sponsor candidates for Bleckley County's sole commissioner office because such candidacies are futile." App. 79.

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[13] Personal preferences also perpetuate residential segregation. In the early 1980s a black employee of the Georgia Power Company contracted to buy a home in a white neighborhood in Cochran. Local whites opposed the sale and the black person decided to live elsewhere. Tr. 69-70, 277.

[14] For example, in 1989 state senator Joseph Kennedy was scheduled to speak at the Cochran Rotary Club in connection with his bid for lieutenant governor. An aide called defendant Holder prior to the engagement and asked him to "get as many blacks together" as possible to help promote Kennedy's candidacy. Tr. 512. Instead of inviting blacks to the Rotary Club, Holder arranged for the two blacks on the city council to meet separately with Kennedy at the public library.

[15] According to plaintiff Roberson, "a lot of people will not go there to vote because of [the racially exclusive membership policy of the Jaycees]." Tr. 83.

3. Political Cohesion

The court of appeals found that "the record evidence . . . coupled with the existence of racially polarized voting, conclusively reveal that the *Gingles* requirement of political cohesiveness has been satisfied." App. 85.

4. The Totality of Circumstances

The court of appeals held that plaintiffs had satisfied the test for proving a violation of Section 2 prescribed by the Court in *Thornburg v. Gingles, supra*, that at a minimum the burden was shifted to the county to offer rebuttal evidence, and that "[n]o meaningful rebuttal evidence" was offered. App. 86. The court also concluded that "the totality of the circumstances found in Bleckley County clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged 'on account of race or color.' " *Id.*

Finding a violation of Section 2, the court of appeals reversed and remanded "for the imposition of a remedy," which "could well be modeled" after the existing single member district plan for the county board of education. App. 86. Having decided the case on a statutory ground, the court did not reach plaintiffs' constitutional vote dilution claim. App. 68 n.6.

The court of appeals denied the county's suggestion of rehearing en banc on May 27, 1992. App. 88. This Court granted the petition for writ of certiorari on March 1, 1993, but limited the question presented to "[w]hether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive

under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973." Joint Appendix 3.

SUMMARY OF ARGUMENT

Section 2 applies to plaintiffs' challenge to the at-large elected sole commissioner form of government in Bleckley County, whether or not the commissioner is regarded as a single member office. *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376, 2381 (1991) ("the 'single-member office' theory, even if accepted, cannot suffice to place an election for a single-member officeholder entirely beyond the coverage of § 2 of the Act"). Congress intended that "the Act be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991). There is no basis for excluding a legislative office, such as the commissioner, from the scope of Section 2.

The commissioner is not, however, a single member office. A single member office is one which exercises, either exclusively or primarily, executive powers, *The Federalist* No. 70, at 424 (A. Hamilton) (C. Rossiter, ed. 1961), *Dillard v. Crenshaw County, Ala.*, 831 F.2d 246, 251 (11th Cir. 1987), and which has never been regarded as being divisible. Such offices have *always* been held by one person. The commissioner, as the county governing authority with exclusive legislative power, is like a state general assembly or a city council.

A county governing authority has never been regarded in the United States as a single member office, such as a governor or mayor. Georgia is the only state which uses a sole commissioner; all other states use

multi-member county governing bodies. State law does not define the county governing authority as a single member office, nor require or favor a sole commissioner. The multi-member board of commissioners form of county government is overwhelmingly predominant in Georgia, with a five member board being the most common size.

There is nothing immutable under state law about the sole commissioner, as there is about a clerk of superior court or a sheriff. Individual counties have frequently switched back and forth between a sole commissioner and a board of commissioners. The county governing authority in Georgia is not a true single member office but simply a body the size of which may vary from one to three to five or more members.

Treating the commissioner as a single member office would have serious negative consequences for minority political participation. Discrimination prone jurisdictions would be encouraged to abolish their legislative bodies elected from districts, and consolidate all legislative and executive power in the hands of a single at-large elected executive official. In that way a bloc voting majority could dominate the election of all the county's legislative and executive positions. Unless the minority could prove that the change was intentionally discriminatory, it would be without any remedy for the denial of its equal voting rights. *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980).

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, would not be an adequate check on such retrogressive voting changes. Although a change in the size of an elected body would be covered by Section 5, *Lockhart v.*

United States, 460 U.S. 125, 131 (1983), a transfer of decisionmaking authority would not be. *Presley v. Etowah County Commission*, 112 S.Ct. 820, 830 (1992). A covered jurisdiction could escape Section 5 review simply by retaining its legislative body but transferring all the legislative powers of government to a single at-large elected executive official.

The commissioner system exists today in Bleckley County, not because the state has a compelling interest in limiting the office to one person, but because the electorate, which is majority white, and which the court of appeals found was racially polarized, rejected the referendum which would have established a fairly elected board of commissioners. Given the racial bloc voting that exists in Bleckley County, the requirement of a majority vote, and the concentration of all legislative and executive power in the hands of a single at-large elected official, the sole commissioner is the purest form of discrimination for a political system. It denies blacks the opportunity to elect *any* of the legislative or executive officials of the county. The sole commissioner is essentially a plantation form of county government, and is not entitled to deference under the Voting Rights Act.

The opinion of the court of appeals does not foreclose a county from having a chief executive or administrative official, even one elected at-large. The chair could be rotated among the members of the board of commissioners elected from districts, the county could hire a chief executive, or it could develop a clearly delimitated job description of an at-large elected chair that would guarantee no infringement on the work of the associate commissioners. None of the Section 2 challenges in other sole

commissioner counties in Georgia have resulted in the elimination of a chief executive officer.

The opinion of the court of appeals does not establish "proportional representation" as the standard for determining a Section 2 violation. The court applied the geographic compactness standard of *Thornburg v. Gingles*, *supra*, based upon the size of the county governing authority provided for by state law and custom. The general assembly has authorized a board of commissioners for Bleckley County consisting of a chairperson elected at-large and five members elected from single member districts, while a five member board of commissioners is the predominant configuration for county governing authorities in the state. The court of appeals did not establish an open-ended standard of proportional representation in Section 2 cases in which the size of a governing body could be infinitely expanded until a majority black district were created.

The commissioner is fundamentally different from a multi-member body, and poses an inherently greater threat to minority political participation, in that the discriminatory effect of racial bloc voting for a multi-member body can be ameliorated by redrawing district voting lines. The discriminatory effect of racial bloc voting for the commissioner can never be ameliorated by redistricting since there is only one "district" and the "district" is the entire county.

In finding racial bloc voting the court of appeals considered both election and non-election evidence. In doing so it followed the decisions of this Court and lower federal courts. *Thornburg v. Gingles*, *supra*, 478 U.S. at 57 n.25; *Nevett v. Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978);

Lodge v. Buxton, 639 F.2d 1358, 1378 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613, 623, 627 (1982).

The court of appeals did not establish a new standard for political cohesion. It properly found that the record evidence, coupled with the existence of racially polarized voting, showed that the *Gingles* requirement of political cohesiveness had been satisfied. 478 U.S. at 56.

The factors identified by this Court in *Rogers v. Lodge*, *supra*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977), as being probative of racial purpose show that the commissioner form of government in Bleckley County is being maintained intentionally to discriminate against blacks. The at-large system impacts more heavily upon blacks than whites. No black has ever been elected to a county office at-large, and given the existing polarization in the county it is unlikely that one ever will. The historical background of the adoption of the sole commissioner system shows that it was enacted at a time when blacks were excluded from the electorate and white supremacy was systematically maintained throughout the state.

The "sequence of events" shows that at-large elections in Bleckley County were made into a more secure mechanism for discrimination by the enactment of a majority vote requirement by the general assembly in 1964 to thwart black voter registration and dilute minority voting strength. The maintenance of the commissioner system is a substantive departure from the norm in that most counties in the state use a board of commissioners form of government. Indeed, the general assembly has authorized a board of commissioners for Bleckley County but the legislation was defeated in a countywide referendum. The foreseeable consequence of maintenance of the

present system is also "one type of quite relevant evidence of racially discriminatory purpose." S.Rep. No. 417, *supra*, at 27 n.108, *citing Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979).

ARGUMENT

I. Section 2 Applies to Petitioners' Use of a Sole Commissioner Whether or not it Is Regarded as a Single Member Office

Bleckley County is plainly wrong at the outset in claiming that "vote dilution principles . . . do not apply . . . to single member offices." Brief for the Petitioners, p. 19. This Court squarely rejected such a contention in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376, 2381 (1991), where it held that elections even for single member offices were not excluded "from the *coverage* of the § 2 results test" (emphasis in original).[16]

According to the Court, a Section 2 violation might be proved, for example, "if a particular practice or procedure, such as closing the polls at noon, results in an abridgment of a racial minority's opportunity to vote and to elect representatives of their choice." 111 S.Ct. at 2381. By way of further illustration, a Section 2 violation might be shown where the boundaries of the district of a single member office were drawn "to produce an unnatural

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[16] *Houston Lawyers' Association* effectively reversed the holding of the majority in Butts v. City of New York, 779 F.2d 141, 148 (2d Cir. 1985), relied upon by the county, Brief for the Petitioners, p. 19, that New York's 40% "near-majority" rule for election of the mayor, city council president, and comptroller could never violate Section 2 because these positions were single-member offices.

distribution of the voting power of different racial groups." *Id.* For these, and similar, reasons "[e]xempting elections for single-member offices from the reach of § 2 altogether can therefore not be supported." *Id.*

Section 2 "prohibits all States and political subdivisions from imposing *any* voting . . . standards, practices, or procedures which result in the denial or abridgment of the right to vote." *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (emphasis in original). *Accord, Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991) (the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination"); S.Rep. No. 417, 97th Cong., 2d Sess. 30 (1982) ("Section 2 remains the major statutory prohibition of all voting rights discrimination").

In addition, the legislative history of Section 2 makes clear that dilution of minority voting strength in the election of legislative offices was a central concern of the Voting Rights Act. Congress expressly adopted the standards for vote dilution developed in *White v. Regester*, 412 U.S. 755, 767 (1973), which guaranteed the equal right of minorities "to elect legislators of their choice." S.Rep. No. 417, *supra*, at 27. There is nothing in the language of Section 2, the legislative history, or the decisions of this Court that suggest any category of legislative officials should be entirely excluded from the reach of Section 2 based on the mere happenstance of the size of the legislative body.

Section 2 vote dilution principles clearly apply to plaintiffs' challenge to the at-large elected sole commissioner form of government in Bleckley County. The real issues presented are whether the office of the commissioner of Bleckley County is a true single member office,

or whether the state has a preclusive interest in the at-large method of electing the county governing authority. *Houston Lawyers' Association v. Attorney General of Texas, supra*, 111 S.Ct. at 2381. The answer to these questions is in the negative. The decision of the Eleventh Circuit was therefore correct.

A. The Commissioner Is not a Single Member Office

A single member office, such as president of the United States, or governor of Georgia, or sheriff of Bleckley County, or mayor of Cochran, is one in which the executive powers of government predominate and which has never been regarded as being divisible. Such offices have *always* been held by one person. The county governing authority, by contrast, is like a state legislature or a city council. The legislative powers of government are concentrated in it and it always is – except in a dozen or so counties in Georgia – a multi-member body which can be divided into smaller districts for election and representation purposes.

While this Court has never expressly defined or approved the term, single member offices have traditionally been regarded as those which exercise, either exclusively or primarily, executive powers. As noted in the Federalist papers:

> Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justness of their views have declared in favor of a single executive. . . . They have, with great propriety, considered energy as the most necessary qualification of [an executive], and have regarded this as most applicable to power in a single hand.

The Federalist No. 70, at 424 (A. Hamilton) (C. Rossiter, ed. 1961). On the other hand, those offices which exercise primarily legislative powers of government have traditionally been regarded as multi-member bodies. Again, as the Federalist papers note:

> a numerous legislature [is] best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

Id., at 424.

Consistent with the Federalist papers, the Eleventh Circuit has observed that single member offices "are most commonly limited to non-legislative functionaries," such as sheriffs, probate judges, and tax collectors. *Dillard v. Crenshaw County, Ala.*, 831 F.2d 246, 251 (11th Cir. 1987). "For these positions, at-large, non-proportional elections are inherent to their nature as single-person officers elected by direct vote." *Id.* Other offices identified by the lower federal courts as single member offices include lieutenant governor and vice president, *id.*, mayor, city council president, and comptroller, *Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985), probate judge, *United States v. Dallas County Commission, Dallas County, Ala.*, 850 F.2d 1430, 1432 n.1 (11th Cir. 1988), and mayor, sheriff, and governor. *SCLC v. Siegelman*, 714 F.Supp. 511, 518 and n.19 (M.D.Ala. 1989).[17]

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[17] In Latin American Citizens Council #4434 v. Clements, 914 F.2d 620 (5th Cir. 1990), rev. sub nom. Houston Lawyers' Association v. Attorney General of Texas, supra, a majority of the court of appeals en banc held that Section 2 did not apply to the method of electing trial court judges. According to the concurring opinion of Judge Higginbotham, trial court judges were single-office holders immune from the statute "because each

There is no bright and absolute line between executive and legislative functions of government, and for that reason any definition of a single member office that turned exclusively on the functions or powers of the office would be impossible to apply in a consistent manner. Some traditional single member executive offices exercise legislative powers. Lieutenant governors and vice presidents are universally recognized as executive "single-office" positions, but they exercise legislative functions when they preside over legislative bodies and break tie votes. *Id.* As *Dillard v. Crenshaw County, Ala., supra*, recognized, "[e]ven on a constitutional level, where the separation is of utmost significance, there is, at the margin, great, and perhaps purposeful, ambiguity as to the separate realms [of executive and legislative powers]." 831 F.2d at 252 n.14, and cases cited therein.

What all single member offices, whether non-legislative functionaries or lieutenant governors, have in common is not simply that they are predominantly executive offices, but that they are not divisible. One lower court

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exercises his or her authority independently of the other judges serving in the same area or on the same court." Houston Lawyers' Association, supra, 111 S.Ct. at 2379-80. Judge Johnson, in his dissenting opinion, argued that judges were not single-member office holders, and that the concurrence's definition was no definition at all since "[e]very officeholder exercises complete authority over the duties of his or her office." Latin American Citizens Council #4434, supra, 914 F.2d at 661. In vacating and remanding, this Court did not attempt to resolve the dispute over definition between the concurrence and the dissent, but held simply that "the 'single-member office' theory, even if accepted, cannot suffice to place an election for a single-member officeholder entirely beyond the coverage of § 2 of the Act." 111 S.Ct. at 2381.

has concluded that the term single member office properly "refers to a situation where under no circumstances will there ever be more than one such position in a particular geographic voting area." *SCLC v. Siegelman, supra*, 714 F.Supp. at 518. Under this definition, mayors and governors are single member offices because "it is unheard of to have more than one." *Id. Accord, Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620, 662 n.20 (5th Cir. 1990) (Johnson, J., dissenting, adopting "the *Siegelman* court's definition of single member office"), *rev. on other grounds sub nom. Houston Lawyers' Association v. Attorney General of Texas, supra.*

The commissioner of Bleckley County is not a true single member office. First, the county governing authority, which has "original and exclusive jurisdiction" over all county legislative functions, O.C.G.A. § 36-5-22.1(a), has never been regarded in the United States as a single member office, such as a governor or mayor. Georgia is the only state which uses a sole commissioner. *Supra*, at 4.

Second, state law does not define the county governing authority as a single member office. The Constitution of Georgia establishes certain single member offices which are, and always have been, required to be elected by the qualified voters of each county at-large, *i.e.*, clerk of the superior court, judge of the probate court, sheriff, tax receiver, tax collector, and tax commissioner. Art. IX, Sec. I, Para. III. The county governing authority is not included in this list.

Third, there is no preference under state law for a sole commissioner. The multi-member board of commissioners' form of county government is overwhelmingly predominant in Georgia, with a five member board being

the most common size. At the present time, only about a dozen counties still use the sole commissioner system.

Fourth, there is nothing immutable under state law about the sole commissioner, as there is about the clerk of superior court or sheriff. Individual counties have frequently switched back and forth between a sole commissioner and a board of commissioners. Carroll County, for example, had a five member commission in 1885. In 1894 the general assembly enacted a sole commissioner for the county. In 1903 the general assembly replaced the sole commissioner with a five member commission. In 1908 the county went back to a single member commission. In 1945 the county changed again, this time to a three member commission. In 1951, it changed back to a sole commissioner. The sole commissioner was in effect when the county was sued in 1986. *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1551 (11th Cir. 1987).

Telfair, Webster, and Wheeler Counties, former sole commissioner counties that were also sued under Section 2, *see supra*, at 4 n.5, all had boards of commissioners at one time or another in the past. Telfair County had a five member board of commissioners elected from single member districts in 1908, Ga. Laws 1908, p. 350, a sole commissioner in 1909, Ga. Laws 1909, p. 451, a three member board of commissioners elected from single member districts in 1913, Ga. Laws 1913, p. 439, a sole commissioner in 1916, Ga. Laws 1916, p. 508, a five member board of commissioners elected at-large in 1923, Ga. Laws 1923, p. 317, and a sole commissioner again in 1931. Ga. Laws 1931, pp. 566, 574.

Webster County adopted a board of commissioners in 1872 which it maintained for many years. Ga. Laws 1872, p. 479; Ga. Laws 1920, p. 641. When it was created in

1913, Wheeler County had a three member board of commissioners elected from single member districts. Ga. Laws 1913, p. 459; Ga. Laws 1920, p. 643.

There has never been an instance in which the office of clerk of superior court or sheriff was expanded and contracted in the manner of a county governing authority. That is because the former are true single member offices and the latter is not.

Fifth, the Georgia general assembly has expressly authorized a multi-member board of commissioners *for Bleckley County*, consisting of five members elected from single member districts and a chairperson elected at-large. Ga. Laws 1985, p. 4406. Implementation of the plan was defeated in a countywide referendum. As noted *supra*, not only is the county majority white but "the evidence conclusively establishes a pattern of racially polarized voting." App. 84-5.

In law and fact the county governing authority in Georgia is not a true single member office but simply a body the size of which may vary from one to three to five or more members. The county governing authority is therefore fundamentally different from a governor or mayor, of whom there can only be one.

The error of the county is in arguing that the *sole commissioner* cannot be subdivided. The real issue, however, is whether the *governing authority* can be subdivided. It clearly can be.

This Court rejected arguments similar to those raised by the county in this case in *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989). There, the board, which consisted of the five borough presidents of New York and the mayor, comptroller, and president of city council, claimed that one person, one vote principles did

not apply to it because it was "a unique body wielding non-legislative powers." *Id.* at 692. This Court held that because the board had significant "legislative functions" equality of population analysis was applicable. *Id.* at 696. Thus, even assuming there was no way to subdistrict the executive powers of the members of the board, their legislative powers were subject to equal protection standards. As for the argument that the unique form of the board was "supported by the city's history" and should not be disturbed, this Court held that the dilution of citizens' voting strength could not be justified "based on exigencies of history or convenience." 489 U.S. at 703 n.10. By the same token, the exigencies of history and convenience cannot justify the debasement of the voting strength of blacks in Bleckley County.

If the county's argument that the commissioner is a single member office were correct, then the at-large elected commission form of city government would also be immune from vote dilution challenge under Section 2 because each of several commissioners, such as the commissioner of public works or the commissioner of public safety, would be a single member office. No court has ever applied a single member office analysis to a legislative body such as a city commission, including this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *See, e.g., Brown v. Board of Commissioners of Chattanooga, Tenn.*, 722 F.Supp. 380, 382 (E.D.Tenn. 1989) (invalidating at-large elections for city commission even though commissioners "serve as the administrative heads of their respective departments"); *Buchanan v. City of Jackson, Tenn.*, 683 F.Supp. 1515, 1522 (W.D.Tenn. 1988) (at-large elections for city commission violate Section 2 even though "[e]ach commissioner was assigned specific duties by the city

charter"); *McNeil v. City of Springfield, Ill.*, 658 F.Supp. 1015, 1020 (C.D.Ill. 1987) (striking down at-large elections for city commission even though each commissioner is "a specific executive office"); *Bolden v. City of Mobile, Ala.*, 542 F.Supp. 1050 (S.D.Ala. 1982) (invalidating at-large elections for the city commissioners of Mobile).

Adoption of the county's argument would have other serious negative consequences for minority political participation. Discrimination prone jurisdictions would be encouraged to abolish their legislative bodies elected from districts, and consolidate all legislative and executive power in the hands of a single at-large elected executive official. In that way a bloc voting majority could dominate the election of all the county's legislative and executive positions. *Thornburg v. Gingles, supra*, 478 U.S. at 48 (where voting is racially polarized "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters"). Unless the minority could prove that the change was intentionally discriminatory, it would be without any remedy under the Constitution or Section 2 for the denial of its equal voting rights. *City of Mobile v. Bolden, supra*, 446 U.S. at 70 (requiring proof of racial purpose to establish a constitutional voting rights violation). The jurisdiction would have readily at hand the same non-racial reasons for the change asserted by the county in this case, that the single member office was "economical" and "efficient." Brief for the Petitioners, pp. 7-8.

Even Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, would not be an adequate check on such obviously retrogressive voting changes. *See, Beer v. United States*, 425 U.S. 130, 141 (1976) (voting changes that are

retrogressive are objectionable under the "effect" standard of Section 5). Although a change in the size of an elected body would be covered by Section 5, *Lockhart v. United States*, 460 U.S. 125, 131 (1983), a transfer of decisionmaking authority would not be. *Presley v. Etowah County Commission*, 112 S.Ct. 820, 830 (1992). A covered jurisdiction could escape Section 5 review simply by retaining its legislative body but transferring all the legislative powers of government to a single at-large elected executive official. Under the circumstances there could be no review of the transfer of power under Section 5, and no challenge to the discriminatory at-large method of electing the sole official under the effect standard of Section 2. Such a result would be intolerable under the Voting Rights Act, which was intended to eradicate all forms of discrimination in voting.

The county claims that the sole commissioner is "the purest form of democracy for a political system." Brief for the Petitioners, p. 20. To the contrary, given the racial bloc voting that exists in Bleckley County, the requirement of a majority vote,[18] and the concentration of all legislative and executive power in the hands of a single at-large elected official, the sole commissioner is in reality the purest form of discrimination for a political system. It denies blacks the opportunity to elect *any* of the legislative or executive officials of the county. There is very little

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[18] This Court has recognized that a majority vote requirement "enhanced the opportunity for racial discrimination," White v. Regester, 412 U.S. 755, 766 (1973), and that "[i]n the context of racial bloc voting . . . the [majority vote] rule would permanently foreclose a black candidate from being elected to an at-large seat." City of Port Arthur v. United States, 459 U.S. 159, 167 (1982).

that is democratic about the sole commissioner. It is essentially a plantation form of county government.

B. The State's Interest Is not Preclusive

1. Racial Bloc Voting Maintains the Commissioner

The commissioner system exists today in Bleckley County, not because the state requires it or has a compelling interest in limiting the office to one person, but because the electorate, which is majority white, and which the court of appeals found was racially polarized, rejected the referendum which would have established a board of commissioners. Polarized voting inevitably calls into question not simply the fairness of its maintenance but the legitimacy of the commissioner in Bleckley County. *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 936-37 (4th Cir. 1987) ("[i]t is crucial to the legitimacy of the political system that questions about its fairness be answered unambiguously," *citing United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). The commission is not entitled to judicial deference.

To argue that, notwithstanding the devastating impact of racial bloc voting in Bleckley County, the commissioner is immune from challenge under Section 2 would be to ignore the central point of vote dilution analysis, as well as an underlying rationale for Section 2. As this Court has noted, the theoretical basis for minority vote dilution, which Section 2 was designed to redress, is that "significant white bloc voting" impairs the ability of minority voters to elect their chosen representatives. *Thornburg v. Gingles, supra*, 478 U.S. at 48 n.15. In Bleckley County "significant white bloc voting" maintains the commissioner system, and impedes the ability of blacks

to elect candidates of their choice. The state thus has no legitimate, let alone preclusive, interest in at-large voting for the commissioner of Bleckley County.

2. Granting Plaintiffs Relief Does not Mean the County May not Retain a Chief Executive Officer

Any concern that the opinion of the Eleventh Circuit would foreclose a county from having a chief executive or administrative official, even one elected at-large, or would lead in other cases to multiple mayors or vice presidents is unfounded. As the court noted in *Dillard v. Crenshaw County, Ala., supra*, where at-large elections are shown to dilute minority voting strength a county has several alternatives in retaining executive functions in the hands of a single person. The chair could be rotated among the members of the board of commissioners elected from districts, the county could hire a chief executive, or it could develop "a clearly delimitated job description [of an at-large elected chair] along with other safeguards that would guarantee no infringement on the work of the associate commissioners." 831 F.2d at 253. Nothing in the opinion of the court of appeals or Section 2 prohibits any of these, or other, remedial options.

It is worthy of note that none of the Section 2 challenges in other sole commissioner counties in Georgia have resulted in the elimination of a chief executive officer. *See, City of Carrollton Branch of NAACP v. Stallings*, Civ. No. C84-122N (N.D.Ga. Sept. 17, 1988) (providing for six commissioners elected from single member districts and a chair elected at-large "serving as the full time chief administrative officer of the County"), Appendix to Respondents' Brief App. 1 (hereinafter "Brief App.");

Clark v. Telfair County, Georgia Commission, Civ. No. CV 387-25 (S.D.Ga. Oct. 26, 1988) (providing for a five member board of commissioners elected from single member districts, a chair elected by the board, and the hiring of an administrative officer known as the superintendent of roads and bridges), Brief App. 11; *Nealy v. Webster County, Georgia Commission*, Civ. No. 88-203-ALB-AMER (M.D.Ga. Mar. 16, 1990) (establishing a four member board of commissioners, with a three member legislative component and an at-large elected chair with essentially executive duties who votes only in the event of a tie), Brief App. 23; and, *Howard v. Commissioner of Wheeler County, Georgia*, Civ. No. CV390-057 (S.D.Ga. Jan. 13, 1993) (providing for a board of commissioners elected from single member districts, with a "chief executive" chosen from among the three members), Brief App. 33.[19]

The district court has the duty in the first instance of fashioning a suitable remedy for a Section 2 violation. The remedy may not be the same in every case, but will depend upon the individual facts and circumstances of the particular jurisdiction. Any remedy must be "commensurate with the right that has been violated," and must "fully provide . . . equal opportunity for minority citizens to participate and to elect candidates of their choice." S.Rep. No. 417, *supra*, at 31. Nothing in any of the remedial orders in other sole commissioner cases, nor in the opinion of the court of appeals in this case, is inconsistent with these principles or requires the elimination of

[19] Twenty copies of the exhibits to the opinion of the district court in Howard v. Commissioner of Wheeler County, Georgia, supra, containing a geographic description of districts, have been lodged with the Clerk of this Court.

a chief executive officer. The state thus has no overriding or preclusive interest in maintaining the at-large election of the commissioner.

II. The Court of Appeals Did not Require Proportional Representation

The opinion of the court of appeals does not, as the county contends, establish "proportional representation" as the standard for determining a Section 2 violation, or render "meaningless" the requirement of geographic compactness. Brief for the Petitioners, pp. 24, 26. To the contrary, the court faithfully applied the analysis in *Thornburg v. Gingles, supra*, including the requirement of geographic compactness based upon the size of the county governing authority provided for by state law and custom.

A. The Red Herring of Proportional Representation

Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), contains a disclaimer that nothing in the statute establishes "a right to have members of a protected class elected in numbers equal to their proportion in the population." According to the Senate report, the purpose of the disclaimer was to make clear that minorities could not establish a violation merely by showing that they had not been elected to office in proportion to their numbers in the population. S.Rep. No. 417, *supra*, at 23-4, 27, 31. The decision of this Court in *Thornburg v. Gingles, supra*, 478 U.S. at 46, is to the same effect: "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation."

The court of appeals in this case clearly did not apply a proportional representation standard. It did not rule that the commissioner violated Section 2 merely because blacks had not been elected to the position. Instead, it used the totality of circumstances analysis provided for in *Gingles*. The county's proportional representation argument is a red herring.

B. Gingles and the Geographic Compactness Standard

In *Thornburg v. Gingles, supra,* 478 U.S. at 46, the plaintiffs alleged in their complaint that "the legislative decision to employ multi-member, rather than single member, districts in the contested jurisdictions" diluted their voting strength in violation of Section 2. Under the circumstances it was appropriate for this Court to require plaintiffs to prove that their injury was as they stated it to be, and that they could in fact constitute a majority in one or more single member districts based upon the existing number of seats. As the Court reasoned, if the minority is not sufficiently compact to constitute a majority in a single member district "the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates." 478 U.S. at 50 (emphasis in original).

Here, plaintiffs do not challenge an existing multi-member form but an at-large elected commissioner form of government. They claim that in the absence of the challenged structure – in a multi-member body – they could elect a representative of their choice. Given the nature of the claim, it would be a Catch-22 to require plaintiffs to prove, in the name of *Gingles*, that they were a majority in the district from which the commissioner is

elected. Such a requirement would be tantamount to saying that plaintiffs could not challenge the method of election of the commissioner under Section 2, and would be contrary to the decision in *Houston Lawyers' Association v. Attorney General of Texas, supra,* 111 S.Ct. at 2381.

The arbitrary application of the *Gingles* compactness standard in this case, *i.e.*, that plaintiffs prove they could be a majority in the existing district, would be unwarranted for the additional reason that the commissioner is fundamentally different from a multi-member body, and poses an inherently greater threat to minority political participation. The discriminatory effect of racial bloc voting for a multi-member body can be ameliorated by redrawing district voting lines. *Voinovich v. Quilter, supra,* 113 S.Ct. at 1156 ("[p]lacing black voters in a district in which they constitute a sizeable and therefore 'safe' majority ensures that they are able to elect their candidates of choice"). By contrast, the discriminatory effect of racial bloc voting for the commissioner can never be ameliorated by redistricting since there is only one "district" and the "district" is the entire county.

The *Gingles* compactness standard was developed in the context of a challenge to an at-large multi-member redistricting plan. The standard ensures that a minority will have an equal opportunity to elect at least some of the members of a challenged body under a single member system. 478 U.S. at 50 n.17 (majority black districts allow minorities the opportunity "to elect representatives of their choice"). The procrustean application of the *Gingles* compactness standard argued for by the county in this case would only ensure that blacks would never have the equal opportunity to elect representatives of their choice to any legislative or executive position in Bleckley

County. Such a result would be totally inappropriate and cannot be squared with *Gingles* or the Voting Rights Act.

C. Geographic Compactness and the Commissioner Form of Government

The compactness requirement of *Gingles* is applicable to a challenge to a sole commissioner size of government, and the court of appeals did not, as the county claims, disregard it. Plaintiffs were required to show, not that they could be a majority countywide, but that they could be a majority "within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." App. 74 (emphasis in original). *Accord, Carrollton Branch of NAACP v. Stallings, supra,* 829 F.2d at 1563 (*Gingles* requires plaintiffs to show that they "are sufficiently numerous and compact to constitute a majority in a single member district, if single member districts were created out of the one county district").

The county's claim that there is no limitation on the restructuring that would be permitted under the opinion of the court of appeals is incorrect. Restructuring is ordinarily limited to what is authorized by state law. *Voinovich v. Quilter, supra,* 113 S.Ct. at 1157 ("the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements").

Here, the general assembly has authorized a board of commissioners for Bleckley County consisting of a chairperson elected at-large and five members elected from single member districts. There is no dispute that blacks could constitute a majority in one of the single member

districts. In addition, a five member board of commissioners is the predominant configuration for county governing authorities in the state. Finally, the court of appeals based its geographic compactness analysis on "the five districts currently found in Bleckley County [used by the board of education]." App. 74. The court of appeals did not establish an open-ended standard of proportional representation in Section 2 cases in which the size of a governing body could be infinitely expanded until a majority black district were created. Instead, the court of appeals used as a benchmark for determining compactness the size of the county governing authority dictated by the state's own "apportionment choices." *Id.*[20]

Even in the absence of a clearly defined state benchmark, a court would have inherent equitable power to vary the size of a challenged governing body within the limits of reasonableness in order to comply with federal law. In *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187 (1972), the district court, in fashioning a remedy for a one person, one vote violation, reduced

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[20] The opinion of the court of appeals is also consistent with the decision in McNeil v. Springfield, Illinois, supra, 658 F.Supp. at 1016, in which the plaintiffs challenged the "structure of the government of the City of Springfield." Under the existing structure, a mayor and four commissioners were elected at-large, and single member districts were prohibited. State law also authorized the mayor-aldermanic, strong mayor-aldermanic, and council-manager forms of city government elected from ten districts or wards. Blacks could not be a majority in a four or five district plan, but they could be a majority in a ten district plan. Id. at 1022. Based upon these facts the court concluded that blacks were "geographically compact" within the meaning of *Gingles,* and invalidated the existing commission form of government. Id. at 1022-23, 1033.

the size of the state senate from 67 to 35 members, and reduced the house from 135 to 105 members. This Court reversed because of the extent of the change imposed, and because the district court had bypassed state policy. The Court acknowledged, however, the power of a court to vary the size of a challenged body.

> We do not disapprove a court-imposed minor variation from a State's prescribed figure when that change is shown to be necessary to meet constitutional requirements.

406 U.S. at 199. In a dissenting opinion Justice Stewart agreed that "there is no rigid and absolute limit on a court's equitable discretion to order changes in the size of legislative bodies in order to remedy an unconstitutional apportionment. Every case is different, and these questions are inevitably questions of degree." 406 U.S. at 203.

Although *Sixty-Seventh Minnesota State Senate v. Beens, supra*, involved a constitutional challenge, a court would have even greater remedial power in implementing the Voting Rights Act to combat continuing discrimination in voting. *City of Rome v. United States*, 446 U.S. 156, 176-77 (1980) (in enforcing the Fourteenth and Fifteenth Amendments Congress may prohibit practices that are not in themselves unconstitutional). Section 2 does not in any case mandate the use of any particular voting practices, but only that the practices which are used be racially fair.[21]

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[21] Applying a standard of reasonableness, or "degree," based upon the facts and circumstances of a given case may prove a difficult task. However, as this Court has said in the context of applying Section 2 to the method of electing judges, the task of applying Section 2 in such instances, "difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." Chisom v. Roemer, supra, 111 S.Ct. at 2368.

The cases relied upon by the county are either inapposite, or do not support the county's position. The county claims that in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), this Court "advised against a construction of Section 2 that requires state and local jurisdictions to increase the number of officials elected to particular offices." Brief for the Petitioners, p. 38. To the contrary, *Gregory* involved a state's mandatory retirement requirement for judges, and did not even mention Section 2. The county is also wrong that the Court issued a similar warning in *Whitcomb v. Chavis*, 403 U.S. 124 (1971). There was no issue in *Whitcomb* involving an increase in the size of the legislature.[22]

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[22] The reliance by the county on lower court decisions is similarly misplaced. Neither Romero v. City of Pomona, 883 F.2d 1418, 1420 (9th Cir. 1989), nor McNeil v. Springfield Park District, 851 F.2d 937, 939, 946 (7th Cir. 1988), was a challenge to a sole commissioner or to the form of a governing body, and in neither was the expansion in size of the governing body authorized by state law. In Overton v. Austin, 871 F.2d 529, 536 (5th Cir. 1989), the district court, although it ruled against the plaintiffs on their Section 2 claim, held that *Gingles*, without regard to alternative sizes authorized by state law, permitted an expansion of the Austin city council from six to eight members to satisfy the geographic compactness standard. A majority of the panel affirmed, without disturbing the findings of geographic compactness made by the district court. Thus, notwithstanding the concurring opinion of Judge Jones, *Overton* actually sanctions a restructuring that goes beyond that authorized by the court of appeals in this case.

III. The Court of Appeals' Finding of Vote Dilution Was Correct

Despite the fact that the grant of certiorari in this case was limited to a jurisdictional issue, the county insists upon arguing the merits of the plaintiffs' vote dilution claim. Plaintiffs will respond briefly to the improper arguments of the county.

A. Racial Bloc Voting Exists in Bleckley County

The county claims that in finding racial bloc voting the court of appeals improperly relied upon "anecdotal testimony alone." Brief for the Petitioners, pp. 31, 33 n.25. Nothing could be further from the truth.[23]

The court of appeals in fact considered a great deal of election data. It considered regression analysis data, App. 79, exit poll data, App. 79-80, the defeat of black candidates in city and county at-large elections, and the success of black candidates in city and county district elections, App. 66 n.5, 78 n.13, 81, and elections involving white candidates in which race was an issue. App. 82.[24] It also considered other evidence deemed by Congress and

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[23] Although the county criticizes the court of appeals for relying upon anecdotal testimony, the county has no reservations about relying upon – and even distorting – such testimony itself. It claims, for example, that David Walker, president of the local NAACP chapter, testified "that a qualified black candidate for county commissioner could win." Brief for the Petitioners, p. 23 n.18. That is not a fair or accurate statement of what Mr. Walker said. What he actually said was that Basby would "probably" win running against a "person that's not qualified. But a person that's the same way, he'd lose." Tr. 341.

[24] The county is plainly in error when it says that plaintiffs did not "analyze *any* elections involving white candidates." Brief for the Petitioners, p. 34 (emphasis in original).

the courts as being probative of racial bloc voting, such as the history of segregation, App. 83, discrimination in voting and "in public life and government," *id.*, the minority's depressed socio-economic status, *id.*, present day barriers to political participation, App. 65, 83,[25] segregation of civic and other organizations, App. 84, the views of experienced local politicians, App. 79, and the depressed level of black candidacies for countywide offices. App. 79.

Gingles provides that "[w]here a minority group has never been able to sponsor a candidate, courts *must* rely on other factors [than elections] that tend to prove unequal access to the electoral process." 478 U.S. at 57 n.25 (emphasis supplied). Moreover, where the minority has begun just recently to sponsor candidates, "the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." *Id.*[26]

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[25] The county tries to discount the use of the Jaycee Barn as the county's only polling place by breezily claiming that "[n]o evidence was introduced to show that any voter has been prevented from voting because of the site of the polling place." Brief for Petitioners, p. 31 n.24. Evidence *was* presented that "a lot of people will not go there to vote because of [the racially discriminatory membership policies of the Jaycees]." Tr. 83. The injury to blacks caused by use of the Jaycee Barn is not limited to the fact that blacks are often deterred from voting. Its use also erodes the confidence that blacks have in the fairness of the electoral process, and serves to further enhance racial isolation and polarization. See, United States v. Marengo County Commission, supra, 731 F.2d at 1570; Harris v. Siegelman, 695 F.Supp. 517, 526 (M.D.Ala. 1988).

[26] Plaintiffs believe footnote 25 in *Gingles* means both that: (1) racial bloc voting may be proved by factors other than election data; and, (2) where racial bloc voting cannot be shown

The *Gingles* requirement that where election data is sparse or unavailable a court must look at other factors in determining the existence of polarized voting or access to the electoral process is simply a restatement of pre-existing voting rights case law which was incorporated into Section 2 by the 1982 amendments of the Voting Rights Act. As this Court noted in *Gingles*, 478 U.S. at 44 n.8, "amended § 2 was designed to restore the 'results' test – the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*."

One of the appellate court decisions applying the results test incorporated into Section 2 by Congress was *Nevett v. Sides*, 571 F.2d 209, 223 n. 18 (5th Cir. 1978). S.Rep. No. 417, *supra*, at 23 n.79; Voting Rights Act Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary United States Congress Second Session on S.53, S.1761, S.1975, S.1992, and H.R. 3112, 97th Cong., 2d Sess. 1216-26 (1982) (listing and analyzing applicable appellate court decisions). *Nevett* held that under a "results" analysis:

> Bloc voting may be indicated by a showing . . . of the 'existence of past discrimination in general . . . , large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.' . . . Of course, bloc voting may be demonstrated by more direct means as well, such as statistical analyses, . . . or the consistent lack of success of qualified black candidates.

Accord, United States v. Marengo County Commission, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984).

Under Section 2 the lack of black candidacies is both evidence of and a response to polarized voting. In *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984), the court held that "the lack of black candidates is a likely result of a racially discriminatory system." Other courts applying the results test have reached similar conclusions that a depressed level of minority candidacies is evidence of polarization. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113, 1119-20, 1135 (E.D.La. 1986); *Jeffers v. Clinton*, 730 F.Supp. 196, 213 (E.D.Ark. 1989); *Hendrix v. McKinney*, 460 F.Supp. 626, 632 (M.D.Ala. 1978); *Wilkes County, Ga. v. United States*, 450 F.Supp. 1171, 1174 (D.D.C. 1978).[27]

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because a system is so discriminatory that the minority has never participated in elections as voters or candidates, or where the evidence is simply sparse, a Section 2 violation can still be established by proof that the minority is denied equal access to the electoral process based upon the totality of circumstances identified in the legislative history of Section 2. See, S.Rep. No. 417, supra, at 29. As the court of appeals found, the evidence in this case "conclusively establishes a pattern of racially polarized voting." App. 85-5. Apart from that, the totality of circumstances support a violation of the equal access standard of Section 2 identified in footnote 25.

[27] While the plurality in *Gingles* held that "only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis," 478 U.S. at 68, all the elections relied upon by the Court in finding racial bloc voting were black-white contests, in which the race of the candidate was necessarily taken into account. 478 U.S. at 80-3. Lower courts have interpreted *Gingles* as meaning that "the race of the candidate is in general of less significance than the race of the voter – but only within the context of an election that offers voters the choice of supporting a viable minority candidate." Citizens for a Better Gretna v. City of Gretna, La., 834 F.2d 496, 502 (5th Cir. 1987). Accord, Campos v. City of Baytown, Texas, 840 F.2d 1240, 1245 (5th Cir. 1988). The all white contests in Bleckley County that

In finding that voting was racially polarized, the court of appeals took into account the fact that black candidates were elected in municipal elections after the City of Cochran adopted districts. That blacks consistently lose in county and city elections at-large, but win in county and city elections from majority black districts, is highly relevant evidence that voting is along racial lines. In *Lodge v. Buxton*, 639 F.2d 1358, 1378 (5th Cir. 1981), the court of appeals, in making a finding that voting was racially polarized in Burke County, Georgia, and where there was no statistical evidence, found it "of particular significance . . . that in the one city election in which city councilmen were elected from single-member districts, a Black was elected." The court of appeals' finding that voting was polarized was affirmed by this Court *sub nom. Rogers v. Lodge*, 458 U.S. 613, 623, 627 (1982), in which the Court applied the *White v. Regester, supra*, totality of circumstances analysis.

The testimony of experienced local politicians is also highly relevant under Section 2 in showing the existence or not of racial bloc voting. In *Gingles* the Court relied not only upon statistical analysis, but "the testimony of lay witnesses" to prove that voting was racially polarized. *Gingles v. Edmisten*, 590 F.Supp. 345, 367 (E.D.N.C. 1984), *aff'd sub nom. Thornburg v. Gingles, supra*, 478 U.S. at 41.

Gingles and the other decisions embodying the results standard adopted by Congress clearly show that the court of appeals applied correct legal standards, and properly took into account both election and non-election

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did not offer voters the choice of supporting a viable minority candidate are of little use in determining the existence of racially polarized voting.

evidence in finding that voting in Bleckley County was racially polarized. That finding is not clearly erroneous. *Thornburg v. Gingles, supra*, 478 U.S. at 79.

B. The Court of Appeals Correctly Found that Blacks Were Politically Cohesive

The county claims that the court of appeals established "a new standard" for proof of political cohesion. Brief for the Petitioners, p. 36. To the contrary, the court of appeals faithfully followed the *Gingles* test for political cohesion. According to *Gingles*, 478 U.S. at 56, proof of racial bloc voting "is one way of proving political cohesiveness." In this case, the court of appeals found that "the record evidence . . . coupled with the existence of racially polarized voting, conclusively reveal that the *Gingles* requirement of political cohesiveness has been satisfied." App. 85. There is no basis for the county's claim that the court of appeals established a new standard for political cohesion.

IV. The At-Large Elected Commissioner Is Unconstitutional

The court of appeals, having decided the case on a statutory ground, did not reach plaintiffs' constitutional claim that the at-large elected commissioner was unconstitutional. App. 68 n.6, *citing Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). However, a finding of unconstitutionality, should it be necessary to reach the issue, would be a basis upon which this Court could affirm the decision of the court of appeals. *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977) (a party may make any argument presented below which supports the judgment of the lower court).

In *Rogers v. Lodge, supra*, decided a few days after the 1982 amendment of the Voting Rights Act, this Court affirmed a finding of a constitutional violation in the use of at-large elections in Burke County, Georgia even though there was no evidence that the system was adopted with a discriminatory purpose, and no direct proof of invidious purpose in the maintenance of the challenged system. *Lodge v. Buxton, supra*, 639 F.2d at 1367 n.21, 1373, *aff'd sub nom. Rogers v. Lodge, supra*. A discriminatory purpose in *Lodge* was established by proof of racial bloc voting; the failure of black candidates to win elections; past discrimination against blacks in voting, education, and other areas; a depressed minority socio-economic status and voter registration rates; the large size of the election district; the requirement of running for a designated seat; and, the lack of a subdistrict residency requirement. 458 U.S. at 622-27. Virtually all the *Lodge* factors are present in this case, and support a finding of intentional discrimination in the use of the sole commissioner system.

The senate and house reports that accompanied the 1982 amendments of Section 2 adopted the standard for proving discriminatory purpose established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977). According to the senate report,

> plaintiff may establish discriminatory intent for purposes of this section, through direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions which 'is one type of quite relevant evidence of racially discriminatory purpose.'

S.Rep. No. 417, *supra*, at 27, n.108. The house report, also citing *Arlington Heights*, provides that

> plaintiffs would not be required to prove that a discriminatory purpose was the sole, dominant, or even the primary purpose for the challenged practice or procedure, but only that it has been a motivating factor in the challenged decision.

H.R.Rep. No. 227, 97th Cong., 1st Sess. 30, n.101 (1981).

According to *Arlington Heights*, determining whether racial purpose is a "motivating factor" requires a sensitive inquiry into such direct and circumstantial evidence of intent as may be available. Aside from specific, smoking gun, evidence, *Arlington Heights* identifies various factors that are probative of racial intent: (1) whether the impact of the official action bears more heavily on one race than the other; (2) the historical background of the decision, particularly if it was made in the context of a series of official actions taken for invidious purposes; (3) the sequence of events leading up to the challenged decision; (4) any departures from the normal procedural sequence; (5) substantive departures, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached; and (6) the legislative or administrative history, including contemporaneous statements by members of the decisionmaking body.

Applying the *Arlington Heights* factors to the evidence in this case shows that Bleckley County's at-large elected, sole commissioner form of government has been and is being maintained for the racially discriminatory purpose of diluting black voting strength. The at-large system impacts more heavily upon blacks than whites. No black has ever been elected to a county office at-large,

and given the racial bloc voting in the county it is unlikely that one ever will. The historical background of the adoption of the sole commissioner system shows that it was enacted at a time when blacks were excluded from the electorate and white supremacy was systematically maintained throughout the state.

The "sequence of events" shows that at-large elections in Bleckley County were made into a more secure mechanism for discrimination by the enactment of a majority vote requirement by the general assembly in 1964 to thwart black voter registration and dilute minority voting strength. In *Dillard v. Crenshaw County*, 640 F.Supp. 1347 (M.D.Ala. 1986), for example, the court invalidated at-large elections in several Alabama counties based upon evidence that a *statewide* numbered place law enacted in 1961 had tainted at-large systems wherever they existed in the state. According to the court:

> regardless of the reasons for which the at-large systems were put into place in the various counties . . . the numbered place laws have inevitably tainted these systems wherever they exist in the state. In adopting the laws, the state reshaped at-large systems into more secure mechanisms for discrimination. And as the evidence makes clear, this reshaping of the systems was completely intentional.

640 F.Supp. at 1357. The finding by the district court that the at-large method of elections violated Section 2 was affirmed on appeal. *See, Dillard v. Crenshaw County, Alabama, supra*, 831 F.2d at 252, *affirming in part, remanding in part*, 649 F.Supp. 289 (M.D.Ala. 1986).

The majority vote requirement in Georgia was enacted by the general assembly in 1964 to reshape at-large elections into more secure mechanisms for discrimination wherever they existed, including in Bleckley County. Under the circumstances, the at-large system now being used is the product of intentional discrimination and violates Section 2. *Accord, Dillard v. Baldwin County Board of Education*, 786 F.Supp. 1459, 1468 (M.D.Ala. 1988) (invalidating county at-large elections because they were "a product of . . . racially discriminatory efforts of the Alabama legislature").

The maintenance of the commissioner system is a substantive departure from the norm in that most counties in the state use a board of commissioners form of government. Indeed, the general assembly has authorized a board of commissioners for Bleckley County but the legislation was defeated in a countywide referendum. Blacks in Bleckley County have no meaningful role in the selection of the county commissioner. Such a result is the foreseeable consequence of maintenance of the present system, which is "one type of quite relevant evidence of racially discriminatory purpose." S.Rep. No. 417, *supra*, at 27 n.108, *citing Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979).

The factors relied upon by the Court in *Rogers v. Lodge* and identified in *Arlington Heights* indicate that the at-large elected, sole commissioner form of government in Bleckley County is being maintained with a racially discriminatory purpose.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

CHRISTOPHER COATES
Counsel of Record
111 West Washington Street
Milledgeville, GA 31061
(912) 453-9512

LAUGHLIN MCDONALD
KATHLEEN WILDE
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
Suite 202
44 Forsyth Street, NW
Atlanta, GA 30303
(404) 523-2721

JOHN A. POWELL
STEPHEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Attorneys for Respondents

PLAINTIFF'S EXHIBIT 204

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG, Plaintiffs vs. TRACEY STALLINGS, individually and in his official capacity as MAYOR OF THE CITY OF CARROLLTON; N. T. LANXTON, ROGER ROSSOMONDO, L. COLLINS, and J. CARL WILLIAMSON, JR., individually and in their official capacities as members of the CARROLLTON CITY COUNCIL; HORRIE DUNCAN, individually and in his offical capacity as CARROLLTON COUNTY COMMISSIONER; PATTI BROWN, A. G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in their offical capacities as members of the CARROLL COUNTY ELECTION BOARD, Defendants	CIVIL ACTION FILE NO. C84-122N (Filed Sept. 17, 1988)

CONSENT DECREE

Plaintiffs initiated this action under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and of the Voting Rights Act of 1965, as amended, 42 U.S.C., Sections 1973 *et seq.* (hereinafter referred to as "The Voting Rights Act"), and prayed for declaratory and injunctive relief concerning the methods of electing the Commissioner of Carroll County.

Defendants (Who for the purpose of this Order include only the Commissioner of Carroll County and the Carroll County Election Board) have denied that Plaintiffs are entitled to the relief sought.

The Plaintiffs and Defendants are desirous of implementing a solution to the subject matter of this action for the purposes of resolving this dispute and establishing a method for the future election of a multi-member Board of Commissioners of Carroll County. This Court has jurisdiction of the parties and the subject matter of this action, and the parties have agreed to the electing the Commissioner of Carroll County.

Defendants (Who for the purpose of this Order include only the Commissioner of Carroll County and the Carroll County Election Board) have denied that Plaintiffs are entitled to the relief sought.

The Plaintiffs and Defendants are desirous of implementing a solution to the subject matter of this action for the purposes of resolving this dispute and establishing a method for the future election of a multi-member Board

of Commissioners of Carroll County. This Court has jurisdiction of the parties and the subject matter of this action, and the parties have agreed to the entry of this Consent Decree. Based upon the inherent equitable powers of this Court and the consent of the parties hereto, this Court hereby establishes a Board of Commissioners of Carroll County whose members shall be elected on the basis, of and in accordance with the provisions of this Consent Decree as hereafter stated.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1.

That Defendants agree under the terms of this Order not to further enforce the method of electing the sole of Commissioner of Carroll County as set forth in Georgia Laws 1983, p. 46-56 or any other law.

2.

That there is hereby established a Board of Commissioners of Carroll County who shall consist of seven members. All future elections shall be conducted on the basis of electing one person from the County at large and six persons from single member voting districts, to be know [sic] as Election District Number 1, Election District Number 2, Election District Number 3, Election District Number 4, Election District Number 5 and Election District Number 6. Each such district is particularly described and shall be as set forth in Exhibit "A" attached hereto and made a part hereof, and each such district shall be as drawn in Exhibit "B", attached hereto.

3.

That the at-large member of the Board of Commissioners shall be elected from the County at large and shall serve as the Chairman of the Commission employed by the County and serving as the full time chief administrative officer of the County.

4.

That the General Election scheduled for November 2, 1988, shall be conducted as scheduled and that the person so elected shall serve as the first Chairman of the Carroll County Board of Commissioners until the expiration of his normal term of office and until he is succeeded, pursuant to the terms of this Consent Decree, or other applicable provisions of law, and shall possess and have the duty and responsibility of exercising all of the power given him by law until so succeeded. The Chairman shall have the authority to serve as the governing authority of the County until such time as the remaining members of the Commission take office as provided herein.

5.

The pertinent demographic information for the six Election Districts described in Exhibit "A" and drawn on Exhibit "B", attached hereto, according to the 1980 United States Census of Population, is as follows:

DISTRICT	TOTAL POPULATION	PERCENTAGE DEVIATION	TOTAL BLACK POPULATION	PERCENTAGE BLACK
1	8,465	-9.86%	4,352	51.41%
2	9,933	5.87%	1,600	16.11%
3	9,692	3.30%	620	6.40%
4	9,878	5.29%	679	6.87%
5	9,323	-.63%	1,260	13.51%
6	9,055	-3.49%	1,168	12.90%

6.

The members of the Carroll County Board of Commissioners elected from Election Districts 1 through 6 shall be required to reside within the district and shall be elected in any election whether it be primary, run-off, special or general election, solely by the voters who reside in the respective district.

7.

That a special election for the selection of the members to the Commission for Election Districts 1 through 6 shall be held on or before June 6, 1989, under the procedures set forth herein. This election shall be for a term to expire December 31, 1992.

8.

Each candidate for the special election ordered herein shall be a qualified voter under the Constitution and laws of the State of Georgia, and shall be a resident of the voting district in which the candidate seeks to qualify for election at the time of qualification and shall have been a

resident of the district for the preceding twelve month period ending on the first day of candidate qualification.

Candidate qualifications for the special election shall open on April 3, 1989 and close on April 17, 1989. Candidates shall qualify with the Carroll County Board of Elections and pay a qualifying fee as provided by law.

9.

The terms of office of each Commission member elected by the special election shall begin on the day following the certification of the special election results by the Carroll County Board of Elections.

10.

In the event a member moves his residence from the district the member represents, the position held by such member on the Commission shall immediately become vacant. Vacancies occurring on the Commission shall be filled by special election pursuant to state law. Any person so elected to fill a vacancy on the Commission shall have the same qualifications required for candidates seeking election to that position under the terms of this order.

11.

Polling precincts for such special election shall be those as are regularly and customarily used in Carroll County elections, or as may hereafter be determined by the Carroll County Board of Elections.

12.

Commission members shall be elected by a majority vote of the electors, residing in the district from which the candidate qualifies and voting in such election. In the event no candidate shall receive a majority of the votes cast from the district in which the candidate runs, a run-off election shall be held pursuant to the laws of the state of Georgia.

Except as herein ordered, such election shall be conducted in all respects as a special election under and by virtue of the Constitution and the laws of the State of Georgia. Consistent with the provisions of this order, the Carroll County Board of Elections is hereby authorized and directed to promulgate such rules and regulations, cumulative of those provided by law, in conducting such election, or run-off election, that it may deem necessary to aid in the execution of this order.

13.

The term and conditions of this order shall be binding upon the Defendants, their successors, officers, agents, servants, and all other persons acting in concert with them.

14.

This order sets forth a temporary districting plan and method for electing members to a multi-district Board of Commissioners for Carroll County. It will remain in effect, however, until further order of this Court or until such time as it is superseded by a legislative plan which

is in all respects valid under the Constitution of the United States and Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

15.

The Defendants or their duly qualified successors are directed to notify the Court of any such legislative enactment within fifteen (15) days after being notified of preclearance under Section 5.

16.

The question of whether to require Defendants to pay attorneys' fees and costs, and if so how much, shall be reserved until the completion of this litigation, at which time the parties shall attempt to settle the issue. In the event they are unable to determine the issue of fees, costs and expenses, Plaintiffs may make an appropriate application within thirty (30) days hereof, and accordingly, the Court hereby retains jurisdiction of this action for the purpose of providing whatever further relief may be necessary.

SO ORDERED, this 16 day of Sept, 1988.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

CONSENTED TO:

/s/ Wayne B. Kendall
COUNSEL FOR PLAINTIFFS

/s/ C. David Mecklin, Jr.
COUNSEL FOR DEFENDANTS

/s/ Illegible
COUNSEL FOR DEFENDANTS

CARROLL COUNTY COMMISSIONER DISTRICTS
PLAN ADOPTED FOR CONSENT DECREE &
MODIFIED FOR VOTING PRECINCTS

Plan: PCTCRLR Plan Created: 09/14/88

District	No Members	Total Population	% Deviation	Black Population	% Black
1	1	8465	-9.86	4352	51.41
2	1	9933	+5.87	1600	16.11
3	1	9692	+3.30	620	6.40
4	1	9878	+5.29	679	6.87
5	1	9323	- .63	1260	13.51
6	1	9055	-3.49	1168	12.90

Plan Total:

Ideal District Size for one Member = 9391

Add the following by hand.

	Total	Blacks
District 2		
Tract 9902 B105 (60% of 916/219) =	550	131
District 3		
Tract 9904 B117 (pt.)	3	0
District 4		
Tract 9907 B208 (90% of 220/78) =	198	70
District 5		
Tract 9902 B105 (40% of 916/219) =	336	88
Tract 9907 B208 (10% of 220/78) =	22	8
	388	96
District 6		
Tract 9904 B117 (pt.)	2	0

ORIGINAL

PLAINTIFF'S EXHIBIT 223

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

SHERYL CLARK, et al., Plaintiffs, v. TELFAIR COUNTY, GEORGIA, COMMISSION, et al., Defendants.	Civil Action No. CV 387-25 (Filed Oct. 26, 1988)

ORDER

Pursuant to the prior Order of the Court of February 23, 1988, and with the consent of the parties, the Court adopts the proposed new form of government for Telfair County submitted by the Defendants, together with provisions for implementing such form of government and schedule of elections, as follows:

1. A Board of Commissioners of Telfair County is hereby created to replace the present Telfair County Commissioner and shall be composed of five (5) members elected from single members districts. The districts shall be numbered one (1) through five (5) and are described in detail in attachments A (census map and block data) and B (narrative description). In the event of a conflict between the narrative description and any of the other descriptive documents, the narrative description, unless obviously in error, will prevail.

2. Candidates for each commissioner district shall reside within their respect [sic] districts and shall be voted on and elected solely by the voters who reside in such districts, and shall be qualified for such office pursuant to Georgia law.

3. Terms of office for commissioners shall be for four years. In the event that the first Board of Commissioners does not serve a full four term pursuant to the special elections called for herein, their first term of office shall be considered as a full term for purposes of this Order.

4. Election shall be by majority vote.

5. There shall be no durational residency requirement for the Board of Commissioners other than as provided by general state law, except that candidates must attain their residency in the district they seek to represent at least by the time they qualify as a candidate for the position.

6. Any commissioner who moves his residence from the district that he represents shall automatically terminate his office, and the vacancy shall be filled as hereinafter provided.

7. On the second Tuesday in the month immediately following preclearance by the Attorney General of the provisions of this Order pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, the Judge of Probate Court for Telfair County shall give notice of a special election to elect the Board of Commissioners. The notice shall provide that candidates may qualify for office

beginning at 9:00 a.m. on the second Monday immediately following the giving of notice until 5:00 p.m. on the fourth Friday immediately following the giving of such notice. The election shall be conducted by the Judge of Probate Court and shall be held on the second Tuesday in the second month immediately following the giving of notice of the election.

8. At least thirty (30) days prior to the conduct of the special election provided for herein, the county registrar shall notify each voter by mail of the commissioner district in which each such voter resides.

9. Subsequent elections for the Board of Commissioners shall be held at the time of the regular general election, commencing in 1992 and every four years thereafter.

10. Commissioners elected at the first election held under the terms of this Order shall take office on the Monday following their election, but not sooner than January 1, 1989. Thereafter, commissioners shall take office on January 1 immediately succeeding their election.

11. In addition to the oath required of all county officers, the commissioners shall take an additional oath to perform the duties of their office truly and faithfully, to the best of their skill and knowledge, and to account for all money, property and effects of such county, going into their possession, custody or control and or expended by or under their direction.

12. Before entering upon the discharge of their duties, each member of the board of commissioners shall give bond in the sum of twenty five thousand ($25,000)

dollars, except the chairman of said board who shall give bond in the sum of fifty thousand ($50,000) dollars, with some responsible surety company authorized to do business in Georgia, as his surety, payable to and approved by the Judge of Probate Court of the county and conditional for the faithful performance of the duties of the office, and the full and true accounting for all monies, funds and effects of said county coming into their hands or going into their custody, possession, and be filed in the office of the Judge of Probate Court and be there recorded and safely kept. The premiums on said bonds shall be paid by the county.

13. Should a vacancy occur on the Board of Commissioners by death, resignation, removal of residency from the district or otherwise, the Judge of Probate Court shall call a special election in such district to fill the vacancy within thirty (30) days from the date the vacancy arose. Provided, that should a vacancy occur and the unexpired term is six (6) months or less, the vacancy shall be filed by appointment of the remaining members of the Board of Commissioners. Any person elected or appointed to fill an unexpired term must be a resident of the district in which the vacancy occurred.

14. The Board of Commissioners shall elect a chairman who shall serve at the pleasure of the board. The chairman shall be compensated in the amount of one thousand ($1,000) dollars per month, plus actual out of pocket expenses. The other members of the board shall be compensated at the rate of three hundred ($300) dollars per month, plus actual out of pocket expenses. The clerk and other county employees shall be compensated in an amount to be determined by the Board of Commissioners.

15. The Board of Commissioners shall conduct periodic evaluations of all employees and compensation of employees shall be based upon length of employment, job performance and special training or other requirements for the job.

16. The total compensation to the chairman, the county commissioners and employees shall be paid from the funds of Telfair County. No members of said board shall receive any other compensation for any services or expenses incurred within the county of Telfair, but may be reimbursed for their expenses as provided for hereinafter. Should it become necessary for any member of said board to transact business for the county outside the limits of the county, then his or their expenses shall be paid out of the general funds of the county, when and only after said itemized expense account has been approved by a majority of the board.

17. Said board of commissioners shall hold at least one regular meeting each month, and the initial meeting shall be properly advertised so that the public will be notified and may appear before the board for any purpose. The board may conduct special meetings at any time. At the first meeting of the board, the former commissioner of Telfair County shall turn over to the board, all records, books and official records pertaining and belonging to said county connected with the business of said county, together with all county property, with a full inventory of the same and a full and complete statement showing the financial condition of the county. A complete audit of the books of said county may be made at this time by a certified public accountant. At this meeting, or

as soon thereafter as practicable, the board of commissioners shall organize by choosing one of the members as chairman and one as vice-chairman, and any chairman or vice-chairman shall hold his office until his successor is elected. Nothing herein shall prevent the reelection of any chairman or vice-chairman.

The vice-chairman shall, in the absence or disqualification of the chairman or during the vacancy in office of chairman, perform and discharge all duties of the chairman, and in the event of a vacancy in the office of chairman or vice-chairman the same shall be filled by the board at its next regular meeting after such vacancy becomes known. The chairman shall be the chief executive of the board. He shall see that all orders, resolutions, and rules of said board are faithfully filled and impartially executed and enforced and that all the officers, employees and agents of said board faithfully and impartially discharge the duties required of them. He shall have the general supervision of the affairs of the county, acting under orders of the board, and shall preside at all meetings of the board. He shall have the power to convene the board in extra session upon his own motion or upon written request of two (2) other members of the board, and shall do so whenever two (2) other members make such request in writing. Any three members of said board shall constitute a quorum. The chairman shall not vote except in case of a tie.

18. Said board of commissioners are hereby authorized to elect a clerk. Any citizen of said county, not a member of said board shall be eligible to hold said office of clerk of said board of commissioners, and shall receive a salary for his services to be fixed by said board, which

salary shall be paid in equal monthly installments. Said clerk before entering upon his duties shall give bond, with some responsible surety company, authorized to do business in Georgia, as his surety in the sum of fifty thousand ($50,000) dollars, to be approved by said board of commissioners, the premium on said bond to be paid by the county, payable to the ordinary of said county and his successors in office, and conditional for the faithful performance of his duties as such clerk, and to account for any and all funds, property or effects which may come into his hands as such clerk or otherwise, which said bond shall be filed with the ordinary of said county, and recorded on his minutes, and may be sued on in like manner as the bond of said commissioners. He shall keep minutes of all meetings of said board of commissioners, an inventory of all properties, and such books and records as may be required of him by said board of commissioners, and do such other acts and things as may be required of him by law or by said board of commissioners. The clerk shall serve at the pleasure of the board.

19. The board of commissioners, either themselves or their duly appointed agent, shall purchase all equipment, material and supplies necessary for said county, of such kind and quality and in such quantities as may be needed, and wherever practicable, purchases of all equipment, materials and supplies shall be by competitive bids, which bids shall be kept on file in the office of the commissioners and subject to inspection by the grand jury or other interested citizens. All purchases shall be charged to Telfair County; and before bills therefor are submitted to the board for approval, they shall be audited

and payment therefor recommended by the parties making such purchase; and if approved by the board of commissioners at a regular meeting of said board, said approval shall be endorsed on said bills by the chairman and a list thereof entered upon the minutes of the board, and when this is done warrants therefor shall be regularly drawn, which warrants shall be signed by the chairman and clerk as well as all other warrants drawn on the treasurer shall be signed before payment thereof is made, except that in the absence of the chairman, said vice-chairman shall be authorized to sign warrants. No purchases shall be paid for or be reimbursed by Telfair County without approval prior to purchase by the board or its duly appointed purchasing agent.

20. The board of commissioners may at their discretion, and when they deem necessary, elect a superintendent of roads and bridges. Said superintendent shall give his entire time to said duties as such superintendent and shall not engage in any other business. He shall receive such salary as may be fixed by the board of commissioners, and shall hold his position at the pleasure of the board of commissioners. The chairman may also act as superintendent of roads for an additional salary not to exceed five hundred ($500) dollars a month in addition to transportation.

21. The board of commissioners may have the books and accounts of the tax commissioner; custodian of all county funds; sheriff; superintendent of schools; board of commissioners and such other officers as may be necessary, audited by a certified public accountant of this State after they take charge of the affairs of said county to cover such period as they deem advisable, and every year

thereafter. Said audit shall be filed in the office of said board of commissioners of roads and revenues of said county, and shall at all times be subject to inspection by any citizen or taxpayer of said county. A summary of said audit shall be published in the official organ of Telfair County within thirty (30) days after it shall have been completed.

22. The said board of commissioners shall have, and they are hereby vested with exclusive jurisdiction and control over, the following to-wit: In directing, controlling and caring for all the property of the county according to law; in levying taxes according to law; in establishing, altering, abolishing public roads, private roads, private ways, bridges and ferries, according to law; in establishing, abolishing, or changing election precincts and militia districts according to law; in supervising the tax-commissioner's books; and in allowing the insolvent lists, for said county, according to law; and in settling all claims against the county; examining and auditing all claims and accounts of officers having the care, management, keeping, collecting, or disbursement of money belonging to the county, or appropriating for its use or benefit, and bringing them to settlement; and especially are they charged with frequently examining and auditing the books of all officers through whose hands any county funds much pass; they may require from all such officers, subject to an examination, such reports as may be necessary to keep such board of commissioners, fully informed at all times, of the financial condition of the county; in controlling, caring for and managing the convicts of the county, according to law; in making rules, regulations and provisions for the support

of the poor of the county, according to law; in promoting and preserving the public health of the county, with authority to quarantine against contagious diseases and epidemics, according to law; in regulating and fixing licenses fees as may be provided by law; to sue and be sued in the name of Telfair County; to exercise the power of eminent domain in the manner described by law; and generally to have and exercise all powers heretofore vested in the commissioner of said county when sitting for county purposes; and to exercise such other powers as are granted by law or as may be indispensable to the jurisdiction over county matters or county finance; in selecting and appointing all minor officers of the county whose election or appointment is not otherwise fixed by law, such as superintendent and guards and public work forces, janitor of the court house, superintendent of pauper farm should one be established, county physician and health officer, tax assessors, and county policeman, and other officers and guards as needed and authorized by law; and such board shall have the authority to employ a competent attorney at law, resident of the county, as county attorney to advise the board and represent the county in such matters as the board of commissioners may direct, who shall be paid such salary or compensation as the board of commissioners may direct, out of the regular funds of the county, with authority of said board of commissioners to fix his term of office or to discharge him at any time; in regulating peddling licenses according to law.

23. Said Board of Commissioners may receive contributions for the improvement of the public roads or bridges of the county from persons who own property

along the same, or from any other person or persons, or from the State government, or the United States government, or from any corporation or firm who may be interested in the improvement of the roads and bridges, and such contributions when received shall be used for the improvement of the roads or bridges designated by the contributor.

24. It shall be unlawful for any member of said board or the clerk of said board to have any financial interest in the sale or purchase of any article to or from the county, or to receive any rebate, expense account, transportation, or other valuable consideration in connection with or through the purchase of any equipment, materials or supplies for the county, or the awarding of any contract for said county; and if any commissioner, or the clerk of said board, shall knowingly or wilfully violate any provision of this section, he shall be guilty of a misdemeanor, and upon conviction shall be punished as prescribed by law and shall forfeit his office or be discharged from employment.

25. The board of commissioners shall publish not less than quarterly a report for all receipts and all disbursements of county funds.

26. Ga. Laws 1963, p. 705, which provides that county officers shall be ineligible to succeed themselves after serving two successive terms, shall be applicable to the Board of Commissioners, and the initial terms of members of the Board of Commissioners elected pursuant to the special elections called for herein shall count as a full term for purposes of Ga. Laws 1963, p. 705.

27. Defendants may alter or amend the terms and conditions of this Order in accordance with state law, except that defendants shall not enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that provided for herein without prior approval of the Court and preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1793c.

SO ORDERED THIS 26th day of October, 1988.

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
United States District Judge

I consent, this 14th day
of October, 1988

/s/ Laughlin McDonald
Laughlin McDonald
Attorney for Plaintiffs

I consent, this 19th day
of Oct., 1988

/s/ Billy W. Walker
Billy W. Walker
Attorney for Defendants

PLAINTIFF'S EXHIBIT 226

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY-AMERICUS DIVISION

REV. GEORGE NEALY, et al., Plaintiffs, v. WEBSTER COUNTY, GEORGIA COMMISSION, et al., Defendants.	)	Civ. No. 88-203-ALB-AMER (DF) (Filed Mar 16, 1990)

ORDER

Plaintiffs are black residents and registered voters of Webster County, Georgia. They contend that the at-large elected, single commissioner form of government for Webster County denies or abridges their right to vote in violation of Section 2 of the Voting Rights Act, 42 U.S.C. Section 1972, and the Constitution of the United States. The defendants are the Commission, the Commissioner and the Superintendent of Elections.

The parties are desirous of ending the law suit without further litigation and have agreed upon the following, which the Court accepts and adopts as a settlement of plaintiffs' claims.

1. (a) There is created a board of commissioners of Webster County to consist of a chairperson and three (3) other members to be elected as provided herein. Each candidate for membership on the board, other than the chairperson, shall be a resident of a commissioner district

which the candidate offers to represent and shall be elected by a majority vote of the qualified voters of such district voting in the elections provided for herein. Each candidate for chairperson of the board shall be a resident of Webster County and shall be elected by a majority vote of the qualified voters of the entire county voting in the elections provided for herein.

(b) For the purpose of electing members of the board of commissioners, other than the chairperson, Webster County is divided into three (3) commissioner districts. A verbal description of the districts is attached hereto as Exhibit A and is incorporated herein by reference. A census map showing the location of district boundaries is attached hereto as Exhibit B and is incorporated herein by reference.

2. (a) At a special election to be held on July 17, 1990 all three district members of the board of commissioners shall be elected. Each district member shall serve until January 1, 1993, and until a successor is elected and qualified. Subsequent elections for the commission, including both the district commissioners and the chairperson, shall be held at the regular general election in 1992 and every four years thereafter, and those elected shall take office on the 1st day of January following their election.

(b) The commissioner of Webster County who was elected pursuant to the provisions of an Act creating the office of commissioner of Webster County approved August 23, 1931 (Ga. Laws 1931, p. 597), as amended, shall continue to hold office and shall serve as chairperson of the commission until the board of commissioners

elected at the general election in 1992 takes office on January 1, 1993.

(c) All members of the board of commissioners shall be nominated and elected in accordance with the provisions of chapter 2 of Title 21 of the O.C.G.A., known as the "Georgia Election Code."

(d) Not later than thirty (30) days prior to the conduct of the special election called for herein, the superintendent of elections shall notify each voter of the county by mail of the commissioner district in which he or she resides.

3. (a) Each person offering as a candidate for membership on the board of commissioners shall have been a resident of Webster County for at least 24 months immediately preceding the date the person is nominated as a candidate for said office. Each person offering as a candidate to represent commissioner District 1, 2 or 3 shall be a resident of the respective commissioner district at the time of qualifying for nomination as a candidate for said office. A member of the board of commissioners representing Commissioner District 1, 2 or 3 shall remain a resident of the respective commissioner district during a term of office, and a vacancy shall be created if such a member moves from the commissioner district from which elected.

(b) Candidates for the office of chairperson of the board of commissioners shall have a high school diploma or its equivalent. Candidates for district positions on the board of commissioners are not required to have a high school diploma, but in the event that they do not they must present evidence at the time of qualifying

that they are enrolled in a program leading to the award of a degree that is the equivalent of a high school diploma.

4. In the event a vacancy occurs in the chairpersonship or other member of the board when more than six months remain before the expiration of the term of office, it shall be the duty of the election superintendent for the county, within 15 days after such vacancy occurs, to issue the call for a special election for the purpose of filling such vacancy. If the vacancy is in the membership from Commissioner District 1, 2 or 3 the special election shall be held only in the commissioner district where the vacancy exists. The special election shall be held countywide if the vacancy is in the office of chairperson. Any such special election shall be governed by the provisions of law providing for the holding and conducting of special elections. In the event a vacancy occurs in the chairperson or other member of the board with six months or less remaining before the expiration of the term of office, the probate judge of Webster County shall appoint a qualified person to fill the vacancy for the unexpired term.

5. The chairperson and other members of the board of commissioners of Webster County shall be commissioned by the Governor of Georgia and shall make and subscribe, before any officer authorized to administer oaths, an oath for the faithful discharge of their duties and to account for all funds and property of the county coming into their possession. Such commissioners shall, before entering upon the duties of their office, give a bond in the sum of $10,000.00 each, to be approved by the probate judge, and payable to the probate judge and said

officer's successors in office, conditioned upon the faithful discharge of their duties, and to account for all funds and property of the county coming into their possession. The surety on the bonds shall be a corporate surety company authorized to do business in this state, and the premiums therefor shall be paid from county funds. Such bonds shall be filed in the office of the probate judge and shall be recorded upon said officer's minutes.

6. The board of commissioners shall hold a regular meeting for the transaction of public business pertaining to county matters which shall be held in an appropriate office of the courthouse of Webster County on the first Tuesday in each month of the year, but the board of commissioners may hold additional meetings at any time they deem proper, upon the call of the chairperson or upon the written request of two commissioners other than the chairperson. The members of the board of commissioners shall be authorized to administer oaths and hear testimony as to all matters over which they have jurisdiction when meeting to conduct business pertaining to the county.

7. The chairperson of the board of commissioners shall employ a clerk and such other personnel as the chairperson deems necessary. All such personnel shall receive the compensation fixed by the full board of commissioners which shall be paid from county funds. It shall be the duty of the clerk of the board to attend all meetings of the board of commissioners and keep complete and orderly minutes of all such meetings. The clerk shall file and keep in the order of their date all original orders and papers, petitions, application, and other papers addressed to the board of commissioners concerning

county business. The clerk shall also keep on record and in a separate book the payment of all money out of the county treasury or county depository by order of the board of commissioners, giving the amount and date of such payments and the persons to whom paid and for what purposes paid. The clerk shall also keep a book showing a full and detailed statement of all accounts and other indebtedness contracted by the board of commissioners. All the books, files, and records required to be used or kept in the office of the board of commissioners shall always be ready and open to inspection by any taxpayer of the county during normal working hours. The clerk before entering on the discharge of the duties of office shall be required to give bond and take the same oath as required by commissioners, which bond shall be in the sum of $5,000.00, payable to the board of commissioners for the faithful performance of the clerk's duties. The clerk shall hold the office of the pleasure of the board of commissioners.

8. Three members of the board shall constitute a quorum but no action shall be taken by the board without the concurring vote of at lest two members of the board. the chairperson shall at each regular meeting of the board submit a report of the condition of the county affairs and make to the board such recommendations as the chairperson may deem proper. The board of commissioners shall set such rules and policies as may be necessary for the proper functioning of the board meetings. The chairperson shall vote only in the event of a tie vote by the other members of the board.

9. (a) The chairperson of the board of commissioners shall be presiding officer at all meetings of the board

unless the chairperson is absent, in which event one of the other commissioners shall preside at the meeting. The chairperson of the board of commissioners shall be the chief administrative officer of Webster County and shall supervise and direct the construction, maintenance, and improvement of all roads and bridges in Webster County and supervise and direct the employees, independent contractors, and prison laborers assigned to the county for road construction or maintenance purposes. The chairperson shall conduct these and all other duties pursuant to the policies, rules, resolutions, and ordinances approved and enacted by the full board. The chairperson shall also provide the board with a monthly report on the general status and condition of the road equipment and personnel matters relating to the road department and the status of all road and bridge projects. The chairperson shall be recognized as the official head of Webster County by state, federal, and other authorities for military and ceremonial functions. The chairperson may have such additional powers as the board of commissioners may delegate to the chairperson. The chairperson shall devote full time to the duties of office.

(b) The chairperson of the board of commissioners shall receive from the funds of Webster County an annual salary equal to that of the current commissioner which shall be paid in equal monthly installments from the funds of Webster County.

(c) The other members of the board shall receive a salary of $200 each for each meeting of the board actually attended payable from the funds of Webster County.

10. The board of commissioners of Webster County shall have exclusive jurisdiction and control over the following matters, to wit: in controlling all of the property belonging to the county as the board may deem expedient according to law, including the proceeds of the sale of any and all bonds which may have theretofore been authorized or which may hereafter be authorized in the county; in supervising tax collector's and tax receiver's books; in allowing the insolvent list of the county; in settling all claims and accounts of officers having the care, management, or disbursement of funds belonging to the county and in bringing them to settlement; in providing for the poor of the county; and for the promotion of health as granted by law or not inconsistent with law; to levy taxes for county purposes; to examine the tax digest of the county for the correction of errors; in regulating or fixing license fees or taxes as may be provided by the law; in requiring any county officer or department to submit budget information and budget requests; in maintaining and operating the county public correctional institution or other similar facility of the county as provided by law, such as superintendents, wardens, guards or convicts, and district road overseers; in providing an annual budget and acting on all budgetary matters and budgetary requests. The board of commissioners shall also have and exercise all the powers heretofore vested in the commissioner of Webster County and such other powers as are now or as may hereafter be provided by law for governing authorities of counties, by whatever name called, or as may be necessary for the board of commissioners to effectively carry out its jurisdiction over county matters and county finances.

11. The treasurer of Webster county or depository of the county shall not disburse or pay out any funds from the county treasury on any order unless the same shall have been approved by the board of commissioners and signed by the chairperson of the board of commissioners, provided this requirement shall not apply to the jury script issued by the clerk of the superior court and orders drawn by the judge of the superior court and district attorney; provided, further, that the board of commissioners may be proper resolution or ordinance prescribe rules and regulations which provide for the signing of checks by a person or persons other than the chairperson for the disbursements of county funds. Unless changed by proper resolution or ordinance, only the signature of the chairperson of the board of commissioners shall be required to disburse funds.

12. The board of commissioners shall comply with the budgeting and audit requirements of Chapter 81 of Title 36 of the O.C.G.A.

13. The board shall have the authority to employ a competent attorney at law as county attorney to advise the board and represent the county in such matters as the board of commissioners may direct, who shall be paid such salary or compensation as may be fixed by the board. The county attorney shall serve at the pleasure of the board. Whenever it is deemed necessary, the board may employ additional counsel to assist the county attorney who shall be paid such compensation as the board may direct out of regular funds of the county.

14. The defendants shall maintain a copy of this Order, with attachments, at the county courthouse in the

office of the commissioner in a conspicuous and visible place for inspection and copying during regular business hours by members of the public, and shall cause the Order, with attachments, to be published within thirty (30) days from the date hereof in a newspaper of general circulation in the county.

15. This Order shall be binding upon the parties, their successors, agents and assigns.

16. Prior to implementation, and within thirty (30) days from the date hereof, the defendants shall submit this Order for preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

17. The Court retains jurisdiction over plaintiffs' request for costs and attorneys fees.

AND IT IS SO ORDERED.

/s/ Duross Fitzpatrick
U.S. District Judge

We Consent.

/s/ Laughlin McDonald
Laughlin McDonald
March 7, 1990
Attorney for Plaintiffs

/s/ Jesse G. Bowles
Jesse G. Bowles
March, ___, 1990
Attorney for Defendants

LMC/nealy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

MARVIN HOWARD, et al.,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. CV390-057
COMMISSIONER OF WHEELER COUNTY, GEORGIA, et al.,	:	(Filed Jan. 13, 1993)
Defendants.	:	

CONSENT DECREE, ORDER, AND JUDGEMENT

Plaintiffs initiated this action under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973, and the First, Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States and requested declaratory and injunctive relief concerning the at-large elected single commissioner form of government for Wheeler County, Georgia. Defendants have denied that plaintiffs are entitled to the relief sought.

The parties are desirous of ending this lawsuit without further litigation and have agreed to the method described below for the future election of a multi-member Board of Commissioners of Wheeler County, which the Court accepts and adopts as a resolution of the plaintiffs' claims. THEREFORE, upon due consideration of the record herein, it is ORDERED, ADJUDGED AND DECREED that:

I. JURISDICTION

This Court has jurisdiction of the parties and the subject matter of this action, and the parties have agreed to the entry of this Consent Decree.

II. BOARD OF COMMISSIONERS

A. Defendants will not further enforce the at-large elected single commissioner form of government of Wheeler County, Georgia as set forth in Georgia Laws 1924, p. 378-88 or other law.

B. There is created a Board of Commissioners of Wheeler County to consist of three members to be elected as provided herein. One member shall be elected from each of three single-member election districts, to be known as Election District Number 1, Election District Number 2, and Election District Number 3.

C. For the purpose of electing the district members of the Board of Commissioners, Wheeler County shall be divided into election districts as particularly described and as set forth in Exhibit "A" attached hereto and made a part hereof. (Exhibit "A" is a census block listing and statistical breakdown of the election districts.)

D. The election districts are more completely described on the map attached hereto and made a part hereof as Exhibit "B".

E. The pertinent demographic information for the three Election Districts described in Exhibit "A" and Exhibit "B" attached hereto, according to the 1990 United States Census of Population is as follows:

TOTAL POPULATION
WHEELER COUNTY COMMISSION
SUMMARY

DIST	TOTAL	WHITE	BLACK	HIS-PANIC	OTHER	DEVIA-TION
1	1554	508 32.69%	1026 66.02%	20 1.29%	0 0.0%	-4.90%
2	1659	1377 83.00%	253 15.25%	25 1.51%	4 0.24%	+1.53%
3	1690	1434 84.85%	194 11.48%	56 3.32%	6 0.36%	+3.43%
TOTAL	4903	3319 67.69%	1473 30.04%	101 2.06%	10 0.20%	

VOTING AGE POPULATION
WHEELER COUNTY COMMISSION
SUMMARY

DIST	TOTAL	WHITE	BLACK	HIS-PANIC	OTHER
1	1042	399 38.29%	633 60.75%	10 0.96%	0 0.0%
2	1214	1033 85.09%	160 13.18%	19 1.57%	2 0.16%
3	1239	1061 85.63%	131 10.57%	43 3.47%	4 0.32%
TOTAL	3495	2493 71.33%	924 26.44%	72 2.06%	6 0.17%

F. Each candidate for membership on the Board of Commissioners shall have resided in Wheeler County for at least twelve months immediately preceding the first

day of candidate qualification and in the election district which the candidate offers to represent for at least six months immediately preceding the first day of candidate qualification. Only residents of the district shall vote in a primary, run-off, special or general election for the member representing the respective district. District members shall be elected by a majority vote of the qualified voters residing in the district from which the candidate qualifies and voting in such election. In the event no candidate shall receive a majority of the votes cast from the district in which the candidate runs, a run-off election shall be held pursuant to the laws of the State of Georgia.

G. All candidates for the Board of Commissioners shall be registered electors entitled to vote for members of the General Assembly of Georgia.

H. A special primary and special election shall be held in accordance with the Georgia Election Code, O.C.G.A. Section 21-2-540, to elect the three members of the Board of Commissioners for Election Districts 1, 2, and 3 as defined by the map attached hereto and made a part hereof as Exhibit "B". The special primary shall be held April 6, 1993 and any necessary run-off election shall be held in accordance with O.C.G.A. Section 21-2-501 no sooner than the 14th day and no later than the 21st day after the day of holding the preceding special primary election. Should all candidates for Districts 1, 2 and 3 be unopposed following the special primary election or any necessary run-off, no special election shall be held. A special election, if necessary, shall be held on May 18, 1993 and any necessary run-off election to be held in accordance with O.C.G.A. Section 21-2-501 no sooner than the 14th day and no later than the 21st day after the

day of holding the preceding special election. At the 1993 special primary and, if necessary, special election, each member from Election Districts 1, 2, and 3 shall be elected to a four-year term to extend until the regularly scheduled primary and general election is held in 1996 and a successor takes office on the first Monday in January, 1997. Thereafter, all members shall be elected at the general election immediately preceding the expiration of their respective terms of office for terms of four years and until their successors are qualified and elected and shall take office on the first Monday in January immediately following their election.

I. No later than February 15, 1993, the Superintendent of Elections of Wheeler County shall give notice of a special primary and special election to elect all members of the Wheeler County Board of Commissioners. The notice shall specify the special primary and special election dates as described in paragraph H and the candidate qualification period as described in paragraph J.

J. In anticipation of the special primary election of the Board of Commissioners to be held on April 6, 1993, defendant Superintendent of Elections of Wheeler County or his successor will begin receiving qualifications of candidates for election from each of Election Districts 1, 2, and 3 at 9 a.m., Monday, February 22, 1993 and continue to qualify candidates until 12:00 noon, Friday, February 26, 1993. Candidates shall pay a qualifying fee as provided by law.

K. The terms of office of each Commission member elected by the special primary or special election, if necessary, described herein shall begin on the day following

the certification of the special primary election or special election results by the Superintendent of Elections of Wheeler County.

L. In the event a vacancy occurs on the Board of Commissioners of Wheeler County for any reason other than the expiration of the term of office, the vacancy shall be filled in accordance with the provisions of the Georgia Election Code, O.C.G.A. Section 21-2-540, et seq., and O.C.G.A. Section 36-5-21 and the residency requirement set out in this Decree. In the event a Commission member elected from Election Districts 1, 2, or 3 moves his or her residence from the district the member represents, a vacancy shall exist from such district and shall be filled in the same manner as other vacancies are filled. Any person so elected to fill a vacancy on the Commission shall have the same qualifications required for candidates seeking election to that position under the terms of this Decree.

M. The current commissioner of Wheeler County who was elected pursuant to the provisions of an Act creating the office of Commissioner of Wheeler County, Georgia Laws 1924, p. 378-88, as amended, shall continue to hold office until the Board of Commissioners elected as described herein take office, and shall possess and have the duties and responsibilities of exercising all of the power given him by law until so succeeded.

N. No later than thirty (30) days prior to the conduct of the special primary called for herein, the Wheeler County Superintendent of Elections shall notify each voter of the county by mail of the commissioner district in which he or she resides.

O. The Board of Commissioners shall hold a regular meeting for the transaction of public business pertaining to county matters which shall be held in an appropriate office accessible to the public each month of the year, the day and time and place to be decided by the Board of Commissioners, but the Board of Commissioners may hold additional meetings at any time it deems proper, upon the call of the Chair or upon the written request of two commissioners other than the Chair. The members of the Board of Commissioners shall be authorized to administer oaths and hear testimony as to all matters over which they have jurisdiction when meeting to conduct business pertaining to the county. At the first meeting of the Board of Commissioners elected at the special election described herein, the former commissioner of Wheeler County shall turn over to the Board of Commissioners all records, books and official records pertaining to and belonging to said county connected with the business of said county, together with all county property, with a full inventory of the same and a full and complete statement showing the financial condition of the county. A complete audit of the books of said county may be made at this time by a certified public accountant.

P. The three members of the Board of Commissioners shall elect from among themselves one to serve as the Chair of the Board of Commissioners and one to serve as Vice Chair. The Chair of the Board of Commissioners shall be the presiding officer of all meetings of the Board unless the Chair is absent, in which event the Vice Chair shall preside at the meeting. The Chair shall be the chief executive of the Board of Commissioners.

Q. The Chair shall at each regular meeting of the Board of Commissioners submit a report of the condition of the county affairs and make to the Board such recommendations as the Chair may deem proper. The Board of Commissioners shall set such rules and policies as may be necessary for the proper functioning of the board meetings.

R. Except as superseded by the provisions of this Decree, the Board of Commissioners shall have and exercise all the powers, duties and responsibilities heretofore vested in the Commissioner of Wheeler County pursuant to Georgia Laws 1924, p. 378-88, as amended, as well as all the powers and duties provided the governing authority of each county under the laws of the State of Georgia.

S. The Chair of the Board of Commissioners shall receive a salary of $1,000.00 per month and each of the other two members shall receive a salary of $300.00 per month, all payable from the funds of Wheeler County.

T. The defendants shall maintain a copy of this Order with attachments, at the Wheeler County Courthouse in the office of the Commissioner in a conspicuous and visible place for inspection and copying during regular business hours by members of the public, and shall cause the Order, with attachments, to be published within thirty (30) days from the effective date of this Order in a newspaper of general circulation in Wheeler County.

U. Prior to implementation, and within thirty (30) days from the effective date of this Order, the defendants shall submit this Order to the United States Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

III. ATTORNEYS' FEES, COSTS, AND EXPENSES

Any claim for attorneys' fees, costs, and expenses will be addressed by the Court by separate Order. The Court retains jurisdiction over plaintiffs' request for attorneys' fees, costs, and expenses.

IV. MISCELLANEOUS EFFECTS OF DECREE

A. The terms and conditions of this Order shall be binding upon the defendants, their successors, officers, agents, servants, and all other persons acting in concert with them.

B. Except as they may conflict with the provisions of this Decree, the laws of the State of Georgia shall continue to govern elections for the Wheeler County Board of Commissioners and to continue to conduct, govern, and prescribe the powers and duties of the members of the Wheeler County Board of Commissioners.

C. Should the United States Department of Justice not preclear the election plan and the implementation schedule outlined above on or before March 26, 1993, the special primary and special election called for in this Order shall not be held and the matter shall be brought before the Court for further Order. The Court shall specifically retain jurisdiction of this case until such time as the election plan and implementation schedule or a subsequent plan and schedule is precleared by the Department of Justice.

D. If preclearance is granted, the Court will enter an appropriate order accepting and approving the precleared plan.

AND IT IS SO ORDERED this 13th day of January, 1993.

/s/ Dudley H. Bowen, Jr
DUDLEY H. BOWEN, JR.
United States District Judge

/s/ Mary Wyckoff
MARY WYCKOFF
Attorney for Plaintiffs

/s/ R. Napier Murphy
R. NAPIER MURPHY
Attorney for Defendants

Supreme Court, U.S.
FILED
JUN 21 1993
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No. 91-2012

In The

Supreme Court of the United States

October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

R. Napier Murphy
Counsel of Record

Murphy & Sibley
Post Office Box 4104
Macon, Georgia 31208
(912) 742-8300

W. Lonnie Barlow
Post Office Box 618
Cochran, Georgia 31014-0618
(912) 934-9463

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

The sole issue in this case is whether governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Respondents and their *amici* have failed entirely in their efforts to show that the selection of a particular size for a legislative body can cause the dilution of the voting power of minorities.

As long as a commissioner or a representative is elected from a single-member district, whether that individual is on a board of ten commissioners or is a sole commissioner, minority votes are not "diluted." Thus, while the election of the sole commissioner in Bleckley County may be subject to Section 2, the election of a single commissioner from a single-member district cannot be challenged *as dilutive* under Section 2.

I. WHERE ONE REPRESENTATIVE IS ELECTED TO ONE OFFICE FROM ONE GEOGRAPHIC AREA, MINORITY VOTES ARE NOT DILUTED UNDER SECTION 2.

Respondents acknowledge that the sole commissioner office is "fundamentally different" from a multi-member body. (Resp. Br. p.17). This is precisely the point. It is one thing to draw new single-member districts as a remedy for a violation of Section 2 caused by the use of an at-large election system. It is quite another to use the Act to *subdivide* existing single-member districts. There is no plausible basis for such an application of the Act,

particularly in the absence of a finding of an intent to discriminate.[1]

Indeed, the United States previously agreed that a single commissioner structure is not dilutive under Section 2, noting:

> "The practice of electing only one official to an office in a particular geographic region does not deprive any minority racial group of an equal opportunity to participate and elect 'on account of race or color'; under the single-member office structure of government, it is the group's small size, not its race, that prevents it from achieving a greater measure of electoral success. To be sure, the practice of electing only one official from a particular area may mean that minority groups – whether racial, religious, political, or socio-economic – will be unable to achieve electoral success, but that does not mean that they are being unfairly denied an equal opportunity to participate in the political process. It is inherent in the very nature of our majoritarian democratic political system that numerical minorities lose elections, and Section 2 was not intended to invalidate that democratic system. . . . Accordingly, the practice of utilizing a single-member office does not violate Section 2, because it does not result in the denial of equal

[1] While the Court of Appeals in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), found evidence of an intent to discriminate in the creation of the sole commissioner system in 1946, there has been no such determination in Bleckley County, and in fact a determination was made that there was no intent to discriminate in the creation of the sole commissioner. (Pet. App. 5-6, 10).

> political opportunity on account of race." (U.S. Br. on Pet. for Cert. pp.6-7).

Under a Section 2 analysis, courts must look to whether the existing structure, in this case the single-member district of Bleckley County, is subject to vote dilution analysis. It is not appropriate, and pre-supposes a violation of Section 2, to judge the existing system by any other plan or hypothetical model. In Bleckley County the only possible way to establish a Section 2 violation is to ignore the present system and to assume there is an expanded county government, and then to judge the county as if it were a multi-member system. Every case which has been addressed by the Court thus far has concerned multi-member systems. Bleckley County is unique in that it is, itself, a single-member district, and cannot be subject to challenge as dilutive under Section 2 without subdivision of that single-member district and expansion of the government.

The Court in *Gray v. Sanders*, 372 U.S. 368 (1963), stated:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 379.

In Bleckley County the geographical unit is the county itself. All who live there, regardless of their sex, occupation, income or location of their home, have an

equal vote for their single representative. This is analogous to each person in the state of Georgia voting for one governor of Georgia, regardless of the voter's status, each person in the Eighth Congressional District of Georgia voting for the one congressman from that district, and each person in the United States voting for President. "[E]ach person's vote counts as much, insofar as practicable, as any other person's." *Hadley v. Junior College District*, 397 U.S. 50, 54 (1970). The sole commissioner is the representative of the single-member district of Bleckley County. In this scheme, numerical minorities lose elections, whether they be black or white, Asian or Indian, Republican or Democrat.

Respondents attempt to distinguish the sole commissioner position from other single-member offices, such as President of the United States or governor or sheriff, by examining the powers, duties and responsibilities of each office. This misses the point. The inquiry under Section 2 is not the authority of the office in question but whether the voters for that office have an "opportunity" to participate which is equal to all other voters. In *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), the court held that the 40% "near-majority" rule for the election of the mayor, city council president and comptroller, all single-member offices, could not violate Section 2. It reasoned that Section 2 addresses not the difficulty of a minority victory, or the success of a black candidate, but the participation of minority voters in the election. Since the single-member office was voted on by an electorate in a single-member district, comprised of the City of New York, all voters participated equally, regardless of the majority vote rule. The court in *Butts*

also rejected Respondents' argument that the governing authority can be subdivided in order to establish a violation of Section 2.[2]

Respondents are plainly wrong to contend that minority voters do not have an opportunity to elect any of the legislative or executive officials of Bleckley County as it is currently constituted. Minority voters elect *all* of the legislative and executive officials in the county by virtue of their one-fifth voting population. Respondents do not recognize or admit their influence in these elections. They attempt to establish a violation of Section 2 merely by showing they have not been elected to office in proportion to their numbers in the population, ignoring the proportional representation disclaimer of Section 2.

---

[2] Respondents also complain that the county commissioner is nominated and elected by majority vote, implying that the majority vote requirement was enacted in order to maintain white political control. (Resp. Br. p. 5). The District Court found, however, that Bleckley County, prior to 1964, used both a run-off provision as well as plurality elections. Moreover, in 1964 there were fewer than 50 registered black voters in Bleckley County, and black voter registration did not increase significantly until later. As such, there was little incentive to dilute black influence in Bleckley County in 1964, even under Respondents' logic. Petitioners' evidence established that the majority vote requirement in 1964 was implemented primarily as a protection against the rising influence of the Republican party. (Tr. 613). Furthermore, the only black state legislator in 1964, Senator Leroy Johnson, voted in favor of the majority vote requirement. Bleckley County's representative in the legislature had died, and therefore Bleckley County did not vote one way or the other on the legislation. He had, however, previously voted against similar legislation introduced in 1963.

Respondents argue that the sole commissioner system is subject to challenge, citing *Houston Lawyers' Ass'n. v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), for the proposition that elections for single-member offices are not excluded from Section 2. *Houston Lawyers'*, however, did not concern a single-member district scheme similar to Bleckley County's, but concerned the election of trial judges from multi-member districts. For example, in Harris County, Texas, 20% black, voters elected only three black judges out of 59. The range was from three judges to 59 judges, running in separately numbered positions. The question was whether judges were "representatives" under Section 2. The issue in *Houston Lawyers'* did not concern whether a single-member officeholder from a single-member district, such as a sole commissioner, was subject to challenge "as dilutive" under Section 2. Moreover, no county which had a single judge, regardless of its minority population, was challenged in *Houston Lawyers'*.

Of interest is the fact that the Court in *Houston Lawyers'* pointed out Section 2 covers executive offices also, such as prosecutors, sheriffs, state attorneys general and state treasurers. It follows that Respondents miss the mark when they argue that sole commissioners, because they perform legislative functions, are subject to challenge as dilutive, while executive officers are not. Presumably any officeholder elected in a multi-member scheme is subject to Section 2. On the other hand, a single-member district, such as Bleckley County, electing one official, cannot be subject to a *vote dilution* analysis by its very nature.

Respondents argue that treating the commissioner as a single-member office would have serious negative consequences for minority political participation. Respondents fear jurisdictions will be encouraged to abolish their legislative bodies elected from districts and consolidate all legislative and executive powers in the hands of a single individual. Respondents fail to recognize, however, that any change in the method of electing officials would be subject to pre-clearance by the Justice Department under the provisions of Section 5 of the Voting Rights Act. 42 U.S.C. § 1973(c). If such a change is, in fact, "retrogressive," it could be stopped.

The more important point is that the Voting Rights Act expresses no preference for a particular number of officeholders in a given jurisdiction. No preference is expressed because it is not at all clear that there is a meaningful improvement in the influence exercised by minority voters when they go from being, for example, one-fifth of a single district to being a majority in one of five districts.

Indeed, such a change could itself be "retrogressive." Assume, for instance, a five-member commission is created, with one district having a population of 65% black, and the other four a population of 10% black. The victor in the majority black district must have white crossover votes, thus having some responsibility to those voters. The candidates in the other four districts can win with no black votes, thus having no obligation to black voters. In this scenario, the black electorate has greatly reduced its influence by having a five-member commission instead of one.

The remedy of minority voters in Bleckley County is not federal court intervention, but political campaigning on a grass roots level, which Respondents admit has not been tried to date.

II. A PROPORTIONAL REPRESENTATION STANDARD VIOLATES THE COURT'S MANDATE IN *GINGLES*.

Respondents argue for proportional representation in the absence of the proof required by the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles* the Court stated:

> "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." *Id.* at 50 n.17.

Allowing Respondents to prove their case using a structure other than the existing single-member district – that is, a five-member system – establishes proportional representation as the new standard. This is inconsistent with Section 2's express rejection of any proportional representation requirement.

Indeed, Respondents attempt to use lack of proportionality in precisely the way the 1982 Senate Report and the proviso of Section 2 seek to prevent. S. Rep. No. 417, 97th Cong. 1st Sess. (1982). Blacks comprise 22.4% of the 1990 population. Since there is already a single-member district plan in place, occupied by a white, Respondents demand the expansion of the commission to 5 members so that, if a black is elected, there will be proportional representation. Based on their experience with the five-member Bleckley County Board of Education, Respondents expect to have a black elected in one of the five districts. Respondents have not suggested, however, a three, four or seven person commission although commissions of that size are found in Georgia. None of these other sizes would come as close to producing proportionality as would a five-member commission.

Respondents do not give the Court any indication as to an appropriate stopping point when subdividing single-member districts to insure proportional representation. The reason is that Respondents would have the court look not to the "opportunity" but to the degree of representation of minority voters. An affirmative action standard is thus suggested for Section 2.

Since there are county boards in Georgia that range from one county commissioner to a ten-person commission, the proportional representation or affirmative action standard set forth by Respondents would authorize the courts to assume jurisdiction over other counties and expand local county government. For instance, Bartow County, Georgia has a population of 55,911 people. Of these 8.9% are black. By expanding the county government from a sole commissioner to a ten-member board, a

court could assure that minority voters are proportionately (and presumably properly) represented. Chattooga County, Georgia has 22,242 residents, of whom 8.7% are black. Respondents' new Section 2 standard would not ask whether minority voters in Chattooga County have an opportunity to participate and to elect a representative of their choice, but whether there is a minority candidate on the commission. Since there is only one commissioner in Chattooga County, Respondents would argue that the existing structure is dilutive and that by considering black voting strength in a restructured form of ten county commissioners, a violation of Section 2 is shown. On the other hand, Stewart County, Georgia has a sole commissioner, but is 63.2% black. No argument has been made in Stewart County that the sole commissioner system violates Section 2, presumably because blacks in that county do not constitute a numerical minority. *See* 1990 Census of Population, Georgia, U.S. Department of Commerce, issued June 1992.

The court of appeals herein determined that a challenged practice of electing too few officials to an office can be responsible for minority vote dilution. This is not the test required by the Court in *Gingles, supra*. Even earlier than *Gingles*, the court of appeals in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) noted: "Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." *Id.* at 1305.

Using the reasoning of Respondents and the court below assures that no minority will ever fail on the issue of compactness, because any division or further subdivision of the challenged mechanism can be drawn to insure

a majority black district in proportion to its population. As such, governing bodies will find themselves on the slippery slope to proportional representation, subdividing existing single-member districts and expanding commissions from one commissioner to ten commissioners, or from four to ten, or six to ten.

Indeed, arguably, under the decision of the court of appeals, a minority which composes only 22% of the population within an existing single-member district could claim that it suffers vote dilution if no member of the group has ever run, and consequently has never been elected, and if in at least one election for some other office, such as a presidential primary, members of the minority group preferred a candidate other than the one preferred by the majority group. Assume a population of Hispanics comprising 22% of a single-member district, but making up less than 1% of the population of four other single-member districts in a jurisdiction. Under the argument of Respondents and the reasoning of the court of appeals, the district with 22% Hispanics should be subdivided into five units, so that Hispanics could be a majority in one newly created district. The governing body would now be enlarged fivefold, to 25. Such has happened in Bleckley County. This is the crux of Respondents' argument.

Respondents contend the Voting Rights Act guarantees election of minority candidates, stating: "No black has ever been elected to a county office at-large, and given the existing polarization in the county it is unlikely that one ever will." (Resp. Br. p.18). The Court, however, has squarely rejected such a contention in *Chisom v. Roemer*, 115 L.Ed. 2d 348 (1991), by holding:

> "As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights." *Id.* at 364.

As such, it is not enough merely to prove that a candidate of minority voters has never been elected, but Respondents must also prove that minority voters have less opportunity to participate. Protection of minority voters cannot be bifurcated into two claims, participation or election. *Both* must be proven. Respondents have not demonstrated a lack of participation or an unequal opportunity to participate.[3] Furthermore, while black voters complain that they have not elected any black candidate county-wide, Respondents also have not proven that the present commissioner or any commissioner has not been the candidate of choice of minority voters.[4]

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[3] Indeed, the voter registration statistics show full participation by black voters. Black voters are registered at the rate of 70% of the voting age population, which is equal to registration figures for white voters.

[4] Respondents also do not explain why, if Bleckley County voters are so racially polarized, the county, with white support, agreed in 1984 to a system of districts for election to the school board, with a majority black district. (Pet. App. 10, 25-26; Tr. 157). The fact that Bleckley voters chose to elect their school board from five districts also indicates that the decision to retain the sole commissioner in the 1986 referendum was not racially motivated. If the rejection of the change in the 1986 referendum was racist, as Respondents contend, then this same racism

The opportunity to participate is not separate from the opportunity to elect under the provisions of Section 2(b). *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). While Respondents argue that this reading of Section 2 will result in minority voters having no protection of their right to participate because they will always lack the numbers necessary to elect black candidates, as noted by the court in *Chisom v. Roemer*, this argument "rests on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Chisom v. Roemer*, 115 L.Ed. 2d 348, 364 n.24. The single-member officeholder elected from the single-member district, Bleckley County, is vitally dependent upon minority support for election.

Moreover, the Court in *Gingles* precluded some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have less opportunity than others in the electorate to participate and to elect. These groups "may nonetheless 'possess the potential' to elect candidates of their choice in a single-member district with the help of a sizeable and long-standing white crossover vote." *McNeil v. Springfield Park District*, 851 F.2d 937, 942 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

The court in *McNeil* also recognized the danger of undue expansion, stating: "Adding seats to the boards would create a voting rights violation where none presently exists by enabling appellants to meet the necessary

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should have led to the rejection of the five single-member districts for the board of education two years earlier.

precondition of their Section 2 claim. This is a sort of bootstrapping we cannot accept." *Id.* at 946. Thus, the election of the sole commissioner from the single-member district of Bleckley County should be assessed, not in the vacuum of proportional representation, but in its full context.

III. BLECKLEY COUNTY MUST BE JUDGED AS IT PRESENTLY EXISTS, NOT BY AN ARBITRARY STANDARD.

Respondents also argue that a five-member board of commissioners is the predominant configuration for county governing authorities in Georgia, and thus it is an appropriate "benchmark" by which Bleckley County may be judged. This is another way of arguing that proportional representation should be mandated. However, instead of "benchmarking," Respondents are "bootstrapping."

Using the size of other county commissions or even the most popular size in a state or a political structure is nothing more than arbitrary and convenient. Using such a standard may in fact lead to unwanted and dangerous consequences.

The Lawyers' Committee for Civil Rights Under Law, as amicus curiae, argues that the use of a five-member commission in Georgia is a "common practice" and thus not objectionable. (L.C. Br. p. 14). Questions then arise as to what determines a common practice, how widespread must a phenomenon be to be considered a common practice and whether only the modal structure can be considered a common practice. The Lawyers' Committee does

not consider that there can be multiple common practices within a state.

While a five-member commission may be the modal size of Georgia commissions, it is certainly not the only size. The largest governing bodies at the county level in Georgia have ten person commissions. The smallest have one. *See* State of Georgia, 1991 OFFICIAL DIRECTORY OF UNITED STATES CONGRESSMEN, STATE AND COUNTY OFFICERS (Atlanta: Office of Secretary of State, 1991.) Both of these are authorized by O.C.G.A. § 1-3-3(7) which defines "county governing authority" as "the board of county commissioners, the sole county commissioner, or the governing authority of a consolidated government."

Commissions with three or seven members are also common practices in Georgia. In 1991, the sole commissioner form was the third most common format in Georgia. There were 90 counties with five-member commissions, 22 with three-member commissions and 20 with a sole commissioner. There are only two counties with a ten member governing body compared with 14 sole commissioners in 1993, so that, under the Lawyers' Committee argument, a ten-member body would not qualify as a common practice. State of Georgia, 1991 OFFICIAL DIRECTORY, *supra*. Argument could thus be made that the governing bodies of both Clarke County and Muscogee County, Georgia should be reduced to fit the procrustean bed of common practice.

The United States argues in its brief supporting Respondents that a court would not order the expansion of a commission to 25 or 50 members because "that

numerous a county governing body would be largely, if not entirely, unprecedented in this country." (U.S. Br. p.18). But the Chicago city council has 50 members, New York City has almost that many, St. Louis, which has fewer than 400,000 people, has almost 30 city councilmen. The city of Atlanta has 18. *See* U. S. Commission on Civil Rights, POLITICAL PARTICIPATION (Washington, D.C.: Government Printing Office, 1968). Clearly, if national "precedent" is enough to justify an expansion of this magnitude, such precedent does exist.

Amici also attach significance to the fact that Bleckley County has five districts from which school board members are elected. (U.S. Br. p.20; L.C. Br. p.14). The implication is that there should be, or typically are, the same number of districts in a county commission and a board of education. However, the most common pattern in Georgia in 1991 was a board of education larger than the county commission. This pattern occurred in 64 counties. In 62 counties the number of commissioners equalled the number of school board members. In ten counties the commission was larger than the school board. In 23 counties the commission was elected, but the school board was appointed. If one considers the number of commissioners and board of education members elected from districts in 1991, 23 counties had more commissioners than school board members elected from districts. In 60 counties, the two bodies had equal numbers of members elected from districts and in 53 counties more school board than commission members came from districts. See State of Georgia, 1991 OFFICIAL DIRECTORY, *supra*. Furthermore, the Solicitor General's use of the board of education as a model for Bleckley County suggests if the

school board were appointed, the commission should be chosen in the same way.

The Solicitor General also argues that expanding the commission to five would not be a problem since that is often the size of Georgia commissions. (U.S. Br. p.20). By analogy, however, the Texas Senate, with its 31 members, is one of the small state senates. Thus, under his argument, the Texas Senate could be forced to expand to the modal size for a state senate so that some additional minority seats can be created.

It can thus be seen that trying to establish a "common practice" or trying to find a "benchmark" by which to judge the challenged structure is unwise. This is precisely why the courts have cautioned against judging vote dilution against some hypothetical model rather than the number of positions in the existing governmental body. *See Overton v. City of Austin*, 871 F.2d 529 at 543 (5th Cir. 1989), Hon. Edith H. Jones, concurring.

The Voting Rights Act should provide remedial assistance for governmental wrongs. It should not impose affirmative duties on the state and local governments to enhance minority political power. The district court herein recognized this, noting:

> "There appears to be widespread local disagreement over the respective merits and shortcomings of the alternative systems given the size and revenue base of Bleckley County. After considering all the relevant evidence, it appears that what remains before the court is simply a whole community's disagreement over their preferred form of local government. This court does not have the authority to resolve such

> purely political disputes. The court's powers extend only the resolution of disputes involving a violation of the Constitution, the Voting Rights Act or some other law." (Pet. App. 59).

The district court was echoing the sentiments of Judge Eisele who stated in *Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989): "It might be said that blacks in *every* jurisdiction benefit from having their own in office. However, that is an argument not for federal intervention but for black political organization." *Id.* at 279.

IV. CONSTITUTIONALITY IS NOT AN ISSUE.

Respondents argue that the at-large elected commissioner is unconstitutional. This issue, however, is not before the Court. Respondents did not seek review in this Court of the disposition of the constitutional claims. *See Chisom v. Roemer*, 115 L.Ed.2d 348 at 360.

Notwithstanding, the district court found no evidence of any racial animus in the creation or maintenance of the sole commissioner system. In fact, plaintiffs' expert, Dr. Peyton McCrary, testified that in his research pertaining to the years 1946 to 1964 he found no articulation of a racial purpose for the maintenance of the sole commissioner form in Bleckley County. (App. 24). Most recently, the question of the sole commissioner appeared in the 1986 referendum to determine whether to change the county government to a six member board. In considering this the district court noted:

> "The underwhelming response of Bleckley County voters to the referendum coupled with the lack of evidence from either plaintiffs or

> defendants to demonstrate that race played even a minor role in the referendum campaign indicates a general perception in the community that the referendum results were the product, not of racial motivations, but of a generally held perception favoring a vote against expanding the size of the government: a sentiment which knows no racial barriers. This Court has heard no credible evidence to support plaintiffs' arguments that the referendum itself evidences the alleged discriminatory purpose to maintain the county commission in its present form." (Pet. App. 26-27).

Moreover, the Equal Protection Clause of the Fourteenth Amendment requires that each person's vote count as much as any other person's insofar as practical. *Chisom v. Roemer*, 115 L.Ed.2d at 368 n.31, citing *Hadley v. Junior College District*, 397 U.S. 50 (1970). In the geographic unit for which the representative is to be chosen, that is, the single-member district of Bleckley County, all who participate in the election have an equal vote. This certainly meets the requirement of the Fourteenth Amendment.

While Respondents also complain that the majority vote requirement used in Georgia to govern primary elections is unconstitutional, this issue was not presented in the district court nor the court of appeals, and the district court noted there was no evidence presented at trial to suggest that Bleckley County exercised any control over the implementation of the majority vote requirement. (Pet. App. 27).

The district court recognized the paucity of the evidence concerning the constitutional issues:

"While the facts that racism and segregation are part of the history of the South and the nation, and that these are problems yet subject to full redress nationwide, are not matters subject to quibbling, this court cannot, based simply upon the existence of racial tensions in this county, charge every piece of legislation and every political process carried out with being specifically tainted by discriminatory intent. Plaintiffs in the case *sub judice* have failed to provide any evidence that Bleckley County's single member county commission is the product of original or continued racial animus or discriminatory intent." (Pet. App. 27-28).

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

R. NAPIER MURPHY
Counsel of Record

MURPHY & SIBLEY
Post Office Box 4104
Macon, Georgia 31208
(912) 742-8300

W. LONNIE BARLOW
Post Office Box 618
Cochran, Georgia 31014-0618
(912) 934-9463

Counsel for Petitioners

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No. 91-2012

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACKIE HOLDER, ETC., ET AL., PETITIONERS

v.

E.K. HALL, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DENNIS J. DIMSEY
IRVING GORNSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves the application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to a claim that the practice of electing a sole county commissioner in Bleckley County, Georgia, dilutes the voting strength of black voters. The United States has the primary responsibility for enforcing Section 2, and the resolution of this case will affect that responsibility. In response to the Court's invitation, the Solicitor General submitted a brief at the petition stage of this case.[1]

[1] The government's brief at the petition stage expressed the view that the Voting Rights Act applies to the practice of using single-member offices, but that the practice cannot be

STATEMENT

1. Bleckley County is situated in rural central Georgia. In 1980, it had a total population of 10,767. Twenty-two percent of the population is black; the voting age population is 19 percent black. Pet. App. 4, 5.

Since its creation in 1912, Bleckley County has had a sole commissioner form of government. Pet. App. 4. The commissioner, like all county governing authorities in the State, has both legislative and executive power. Among other things, the commissioner has "exclusive jurisdiction" to control the county's property, to levy taxes, to maintain roads and bridges, to fill vacancies in county offices, to appropriate money, and to make rules and regulations to promote the general welfare. Ga. Code Ann. § 36-5-22.1 (1987). The commissioner is elected by all voters in the county and must receive a majority of the votes cast. Pet. App. 65. No black candidate has ever run for or served as commissioner.[2] *Id.* at 78.

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challenged under Section 2 on a vote-dilution theory. On further reflection, we have concluded for the reasons set forth in this brief that the practice of electing a sole county commissioner is subject to challenge as dilutive in violation of Section 2.

[2] Bleckley County's black community leaders, many of whom are experienced local politicians, expressed the belief that it would be nearly impossible for a black candidate to win an at-large, county-wide election. Pet. App. 78-79. At trial, the district court agreed, stating, "[h]aving run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county. You're going to put your hard-earned time and shoe leather campaigning throughout this county * * * under these circumstances?" *Id.* at 79.

In 1985, the Georgia legislature authorized Bleckley County to adopt by referendum a multimember commission consisting of five commissioners elected from single-member districts and a chairman elected at large. 1985 Ga. Laws 4406. That referendum was defeated by a vote of 1,156 to 887. Pet. App. 9.[3]

2. Respondents are black voters residing in Bleckley County, as well as the local chapter of the NAACP. In 1985, they filed suit in federal district court against petitioners, who are Bleckley County's commissioner and its superintendent of elections. Respondents alleged that Bleckley County's practice of electing a sole commissioner, rather than electing a multimember commission, violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Pet. App. 66.

After a trial, the district court ruled in favor of petitioners. Applying the framework established in *Thornburg* v *Gingles*, 478 U.S. 30 (1986), the district court found that respondents had satisfied the first of the three Gingles preconditions for a vote-dilution claim because, in the absence of the challenged use of a single-member commission, black voters were sufficiently numerous and compact that they would have constituted a majority in one district of a multimember commission. Pet. App. 55; see *Gingles*, 478 U.S. at 50-51. The court found that "[i]f the county commisison were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority 'safe' district * * * would result." Pet. App. 12.

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[3] Four years earlier, county voters approved a five-member district plan for the election of the Bleckley County School Board. Pet. Br. 7 n.5.

The court determined, however, that respondents had failed to prove racially polarized voting in Bleckley County, and had therefore failed to establish the second and third *Gingles* preconditions. See 478 U.S. at 51. In reaching that conclusion, the court assumed that the only way to prove polarized voting is through statistical evidence of voting behavior. Pet. App. 50-51 & n.45. The court noted that respondents had not produced evidence of polarized voting in local elections. *Id.* at 33. Because the county has only one voting precinct, the court found, such evidence was "not available." *Id.* at 25; see *id.* at 33 n.22. Although respondents had offered statistical data concerning the 1984 and 1988 presidential primaries in which Jesse Jackson was a candidate, the court found that the evidence was insufficient to prove a pattern of polarized voting. *Id.* at 37-46, 50-51. The court therefore concluded that respondents had failed to satisfy the third *Gingles* precondition—that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. *Id.* at 51. For essentially the same reason, the court found that respondents had failed to prove the second *Gingles* precondition—that the minority group is politically cohesive. *Id.* at 52-55. The court concluded that respondents' failure to establish these two of the *Gingles* preconditions was fatal to their Section 2 claim. *Id.* at 55-56.

Nonetheless, the court went on to consider other factors relevant to the "totality of circumstances" under Section 2. It found that "blacks in Bleckley County continue to suffer from a depressed socio-economic status," Pet. App. 58; that their status "hinders the possibility of blacks participating actively in the political process," *ibid.*; and that "[t]he

barriers to active participation in the political process are today compounded by the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area." *Id.* at 7 n.3. The court also found that there "have been problems in the past with regard to low black representation among workers at the election polling place." *Id.* at 58.

On the other hand, the court found that "there is no [candidate] slating process to stand as a barrier to minority participation." Pet. App. 59. The court also found that respondents had failed to prove that the sole commissioner was unresponsive to minority voters or that the policy underlying the election of a sole commissioner is "tenuous." *Ibid.* Considering the totality of circumstances, the court concluded that respondents' Section 2 challenge to Bleckley County's practice of electing a sole commissioner "must fail." *Id.* at 59-60.

3. The court of appeals reversed. Pet. App. 62-86. Relying on its decision in *Ca[illegible]n Branch of NAACP* v. *Stallings*, 829 F.2d [illegible]7 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988), the court of appeals held that a challenge to the practice of electing a sole commissioner is "subject to the same analysis" as that used in *Gingles*. Pet. App. 68. Applying that analysis, the court agreed with the district court that respondents had satisfied the first *Gingles* precondition by showing that blacks could constitute a majority of the electorate in one of five single-member districts. *Id.* at 74-75 & n.10. The court rejected the argument that the entire county must serve as the benchmark for determining whether the minority group is sufficiently large to constitute a majority in a district, explaining that it is "appropriate to consider the size and geographical compactness

of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." *Id.* at 74.

The court of appeals further held that the district court had been "operating under a misconception of the law" in finding that respondents had failed to prove racially polarized voting. Pet. App. 76. The court explained that a wide variety of evidence, not only statistical data about elections, is relevant in determining whether there is racially polarized voting. *Id.* at 77. After considering all the relevant evidence, the court of appeals found that the evidence "conclusively" established both white bloc voting and minority political cohesion. *Id.* at 78-85 & n.18.[4]

The court of appeals also concluded that "the totality of the circumstances found in Bleckley County clearly reveal[s] a situation where the electoral power of Bleckley County blacks has been abridged 'on ac-

[4] Among other things, the court of appeals noted that (1) no black has ever run for commissioner, Pet. App. 78; (2) black political leaders testified that it would be futile for a black candidate to run, *ibid.*; (3) the district judge echoed that observation based on his political experience, *id.* at 79; (4) the available statistical evidence revealed polarized voting, *id.* at 79-80; (5) black candidates had consistently lost local elections in which whites constituted a voting majority, but had won when blacks were in the majority, *id.* at 81; (6) a significant number of Bleckley County voters had supported segregationist candidates in the past, *id.* at 82; and (7) Bleckley County had long practiced racial discrimination in all aspects of local life, *id.* at 83-84. Petitioners challenged in this Court the court of appeals' conclusion that respondents had shown white bloc voting and minority political cohesion, but the Court's order limiting the grant of certiorari and formulating the question presented excluded those issues. 113 S. Ct. 1382 (1993).

count of race or color.' " Pet. App. 86. The court of appeals therefore held that respondents had established a violation of Section 2, and it remanded for the fashioning of a remedy. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly determined that the practice of electing a sole commissioner to Bleckley County's governing body can be challenged as dilutive of minority voting power under Section 2 of the Voting Rights Act. If the County had moved from a five-member commission, with one member elected by minority voters, to a single-commissioner system in which minority voters had no power to influence the election, the minority vote clearly would have been diluted. The same analysis applies to respondents' vote-dilution challenge to Bleckley County's existing single-commissioner system.

A. The practice of electing a sole commissioner is a "standard, practice, or procedure" within the coverage of Section 2. This Court has made clear that there is no single-member-office exception to Section 2. *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 111 S. Ct. 2376 (1991). Although a locality's interests in retaining its existing election system are relevant in evaluating the totality of the circumstances and in formulating a remedy, those interests do not provide a per se exemption from Section 2. Applying Section 2 in this case is further supported by the fact that the preclearance requirements of Section 5 of the Voting Rights Act are applicable to changes in the size of a legislative body; Sections 2 and 5 should be accorded a similar reach in this context. *Chisom* v. *Roemer*, 111 S. Ct. 2354, 2367 (1991).

Petitioners claim that minority votes are diluted in this case because of the minority's small size in the voting population, not because of the challenged single-commissioner election practice. That is incorrect. In any vote-dilution challenge to an existing election system, it could be said that the minority's small size, rather than the system itself, is the source of the minority's electoral failure. Thus, the issue of vote dilution must be measured against a proposed alternative voting arrangement that is reasonable in the legal and factual context of a particular case.

B. A vote-dilution challenge to Bleckley County's election of a sole commissioner does not conflict with the first precondition for a vote-dilution claim announced by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986), and does not rest on the premise that Section 2 guarantees proportional representation. In *Gingles*, this Court required the minority group to demonstrate that, in the absence of the challenged structure, "it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. The plaintiffs in this case met that requirement by measuring the voting strength minority voters would have if Bleckley County had a five-member commission elected from single-member districts. That arrangement is common in Georgia and is consistent with state law and policy. Use of such a benchmark does not embrace a theory of proportional representation.

Nor does it imply that the plaintiffs in a Section 2 case may propose a commission of whatever size would be required to ensure that minority voters can elect a representative of their choice. A court would be fully justified, for example, in rejecting a tiny minority's claim of vote dilution premised on an ec-

centric or impracticable alternative method of redistricting. Here, however, it is Bleckley County that has strayed from the norm. Few counties in Georgia, and none in other States, use a one-person commission as the governing body. The choice of a five-member body, by contrast, is common, authorized, and practicable. Line-drawing problems that may arise in other cases do not warrant a finding that vote-dilution principles are inapplicable here.

C. State interests in retaining the challenged form of electing representatives are relevant in a vote-dilution case. The proper point to consider those interests, however, is in evaluating the totality of the circumstances or in developing a remedy. *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, *supra*. In this case, the efficiency and economy interests suggested by petitioner in defense of electing a single individual to constitute the entire county commission do not outweigh the substantial dilution of minority voting strength produced by Bleckley County's unusual scheme.

That a vote-dilution challenge may succeed in this case does not lead to the conclusion that all traditional single-office executive positions, such as mayors, governors, or sheriffs, must be subdivided to comply with the Voting Rights Act. The county commission here exercises all legislative as well as executive authority over the county's citizens. The compelling state interests that support the retention of traditional single-executive positions are absent with respect to the single-member-commission approach employed in Bleckley County, a body that also exercises plenary legislative power within the county government.

ARGUMENT

THE PRACTICE OF ELECTING A SOLE COUNTY COMMISSIONER, RATHER THAN A MULTIMEMBER COMMISSION, IS SUBJECT TO CHALLENGE AS DILUTIVE UNDER SECTION 2 OF THE VOTING RIGHTS ACT

A. Section 2 Is Applicable To Single-Member Offices

1. The initial step in determining whether the Voting Rights Act applies to Bleckley County's practice of electing a sole commissioner is to consider the language of the Act. This Court has held that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom* v. *Roemer*, 111 S. Ct. 2354, 2368 (1991), quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969).

Section 2 of the Voting Rights Act provides that "[n]o * * * standard, practice, or procedure shall be imposed or applied * * * in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority. 42 U.S.C. 1973(a). A violation of that prohibition is established if, "based on the totality of circumstances," it is shown that the political processes leading to nomination or election "are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). The practice of electing a single official to an office in a particular geographic area—the use of a single-

member office—is a "standard, practice, or procedure" within the meaning of Section 2, and elections for such offices thus are covered by Section 2.

This Court recognized that single-member offices are not immune from challenge under Section 2 of the Voting Rights Act in *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 111 S. Ct. 2376 (1991). In that case, the plaintiffs brought a vote-dilution challenge to the election of trial judges to single-member offices on a county-wide basis in Texas. The Court expressly rejected the claim that "the 'single-member office' theory automatically exempts certain elections from the coverage of § 2." 111 S. Ct. at 2381. Instead, the Court held that the "coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected." *Id.* at 2380. The Court made clear that the state interests advanced in support of the challenged practice of electing officeholders on a county-wide basis "are relevant either to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2, as amended," or in formulating "possible remedies"; but those interests do not affect "the threshold question of the Act's coverage" or "automatically, and in every case, outweigh proof of racial vote dilution." *Id.* at 2380-2381.

Houston Lawyers' Ass'n involved a claim that the minority vote was diluted by Texas's failure to establish smaller election districts for a single-member officeholder than the area over which the officeholder exercises jurisdiction, 111 S. Ct. at 2381, while this case involves a claim that the minority's vote is diluted by Bleckley County's failure to establish a larger

commission to carry out the functions currently performed by the sole commissioner. Nonetheless, the principle involved in *Houston Lawyers' Ass'n* is equally applicable here. Elections for single-member offices are not exempt from vote-dilution challenges under Section 2, and any interest the State has in maintaining its electoral practices for such offices should be considered under the totality-of-the-circumstances inquiry or at the remedial stage.

The conclusion that the election of a sole commissioner can be challenged as dilutive under Section 2 is further supported by this Court's decisions under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.[5] This Court has construed the identical "standard, practice, or procedure" language in Section 5 of the Voting Rights Act to apply to changes in the size of legislative bodies. In *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), a city changed from a three-member commission to a five-member council. The Court held that the addition of two seats had the potential to dilute minority voting strength in violation of Section 5, even though there was no change in the underlying method of election. *Id.* at 131. In *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 828 (1992), the Court reaffirmed that a change in the size of a legislative body is a practice with respect to voting covered by Section 5.[6] In view

[5] Section 5 requires covered States or political subdivisions to submit changes in voting standards, practices, and procedures to the Attorney General or to the United States District Court for the District of Columbia for preclearance. See *Clark* v. *Roemer*, 111 S. Ct. 2096 (1991).

[6] A change in the number of representatives who sit on a body is quite different from a reallocation of functions among

of the "close connection" between Sections 2 and 5, those provisions should be accorded a similar reach in this context. *Chisom*, 111 S. Ct. at 2367.

It would, moreover, be incongruous if the practice of electing a sole commissioner could not be challenged under Section 2. A jurisdiction covered by Section 5 would be precluded from changing from a multimember commission to a sole commissioner when to do so would have a discriminatory effect, but the jurisdiction would be exempt from challenge under Section 2 if it had a similarly discriminatory system already in place. This Court has previously found it "unlikely that Congress intended such an anomalous result." *Chisom*, 111 S. Ct. at 2367 (explaining that one reason for finding judicial elections to be covered by Section 2 is that they are covered by Section 5).

2. Under the Section 2 "results" test, the existence of a vote-dilution violation is determined by evaluating the effect of the challenged practice on the ability of minorities "to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(a) and (b). Petitioners contend that the Section 2 results test can never be violated by the practice of electing a sole commissioner, because "[i]t

government officials. In *Etowah County*, the Court held that the preclearance requirements of Section 5 are inapplicable to changes in the allocation of functions performed by the elected officials; a jurisdiction's reduction in the number of elected officials, however, is clearly subject to review under Section 5 because it bears "on the substance of voting power." 112 S. Ct. at 829. Here, in contrast to *Etowah County*, it is the number of elected officials, not the assignment of their functions, that forms the basis for the Voting Rights Act challenge.

is the small size of the group of voters in the district, not its race, that prevents it from achieving a greater measure of electoral success * * *." Pet. Br. 19. That claim is at odds with the theory of the Voting Rights Act. In any challenge to an election practice in which the minority group cannot elect representatives of its own choosing, it could be said that the small size of the group, not the particular election structure, is the cause of the group's electoral failure. If that argument were accepted, it would be impossible to mount a challenge even to a multimember, at-large election system. Yet this Court entertained precisely that form of challenge in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).[7]

In *Gingles*, this Court explained that a minority group's size is relevant to a Section 2 challenge in order to determine whether the group has "the *potential* to elect representatives in the absence of the challenged structure or practice." 478 U.S. at 50 n.17. When the minority group is too small to constitute a voting majority even absent the challenged structure

[7] Our brief at the petition stage (at 5-6) suggested that the practice of electing a single office holder has an adverse effect on minority voters only because of the minority group's small size, and therefore does not meet Section 2(a)'s requirement of producing "a denial or abridgement of the right * * * to vote *on account of race or color*." 42 U.S.C. 1973(a) (emphasis added). Section 2(b), however, provides that a violation of Section 2(a) "is established" when a minority group shows that "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Thus, under the express terms of Section 2(b), if a minority group can show that it has been denied an equal opportunity to elect representatives of its choice, it has, by definition, shown an "abridgement of the right * * * to vote on account of race or color."

or practice, the group "cannot claim to have been injured by that structure or practice."[8] *Ibid.* When, however, the minority group can establish that, with the use of an alternative voting practice or structure it could elect representatives of its choice, the challenge cannot be dismissed on the theory that the group's plight is simply a function of small size combined with a system of majoritarian rule. As we explain below, where, as in this case, the proposed alternative election arrangement against which to measure a claim of vote dilution is reasonable in the legal and factual context of the particular voting practice at issue, analysis of a vote-dilution claim under Section 2 can proceed.

B. The Application Of Vote-Dilution Theory In This Case Is Consistent With *Gingles* And Is Not Premised On The View That Section 2 Guarantees Proportional Representation

Petitioners contend (Br. 24-28) that recognition of a vote-dilution challenge to the County's election of a sole commissioner would undermine the first *Gingles* precondition for a vote-dilution claim and would imply a right to proportional representation. See 42 U.S.C. 1973(b) ("nothing in [Section 2] establishes a right to have members of a protected

[8] The Court has reserved the issue of whether Section 2 applies to a claim that a minority group, even though lacking the size and compactness "to constitute a majority in a single-member district," has been impermissibly impaired in its ability "*to influence* elections" through the use of a multimember district. *Gingles*, 478 U.S. at 46 n.12; see also *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1155 (1993) (assuming without deciding that an influence claim may be brought); *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 n.5 (1993) (leaving open the same issue).

class elected in numbers equal to their proportion in the population"). We disagree.

1. In *Thornburg* v. *Gingles*, *supra*, this Court stated that, as a precondition to a vote-dilution claim based on the submergence of a minority group in a multimember district electing candidates at-large, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[9] 478 U.S. at 50. Petitioners argue that, if the minority group were free to propose a revised voting scheme involving an unlimited number of additional elected positions as a means of demonstrating vote dilution, the group could always establish the existence of a single-member district in which it constituted the majority. The effect of that rule, petitioners argue, would be to guarantee proportional representation for the minority group.

Application of *Gingles* in this case does not produce that consequence. The purpose of the first *Gingles* precondition is to ensure "that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993); *Gingles*, 478 U.S. at 50 n.17. The claim in this case meets that requirement without presupposing any right to proportional representation. In finding that the practice of electing a sole commisisoner is dilutive, the

[9] The Court articulated two other preconditions to a vote-dilution claim—that "the minority group must be able to show that it is politically cohesive" and that "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 51. The court of appeals found those preconditions to be established, and they are not at issue in this Court. See note 4, *supra*.

court of appeals compared it to a five-member commission elected from single-member districts. The proposed five-district arrangement was specifically authorized by the state legislature when it provided for a referendum on a multimember commission in 1985, is common throughout the State, and is used by Bleckley County for electing the school board (Pet. App. 86 n.20). Measuring the minority voters' power to elect against that state-sanctioned electoral arrangement does not threaten to create a right of minorities to have their members elected in proportion to their percentage of the population (no matter how small); it simply takes into account a well-recognized alternative election system that the county was free to adopt.

Nor does acceptance of the claim described above imply that plaintiffs may propose a commission of whatever size is required to create a single-member district in which the minority group would have majority voting strength. The State's electoral policies and traditional ways of structuring local government are of substantial relevance in determining what sort of proposed alternative voting practice can reasonably provide a measure of the dilutive effect of the challenged practice. For example, in *Gingles* this Court stated that a minority group must be "sufficiently * * * geographically compact" to form a majority in a single district. 478 U.S. at 50. The geographical-compactness rule derives not from an express requirement to that effect in Section 2, but rather from traditional characteristics of this country's election districts, as drawn under state law.[10]

[10] In practice the compactness rule is not applied more strictly under Section 2 than the State applies compactness

Similarly, a court would be justified in rejecting a tiny minority's claim of vote dilution that is premised on expanding a county commission to 25 or 50 members, for that numerous a county governing body would be largely, if not entirely, unprecedented in this country. But that does not imply that the court may reject a claim based on a reconstituted commission of a size that is endorsed by state law and fully consistent with state policy.

A five-member body is by far the most common size for a county commission in Georgia. Georgia Dep't of Community Affairs, *County Government Information Catalog* (1989) (Table 1.A: Form of Government) (76 of Georgia's 159 counties had five commissioners, including 25 counties that are smaller than Bleckley County). Indeed, the Georgia legislature expressly authorized Bleckley County to adopt a commission consisting of five members elected from single-member districts (as well as a chairman elected at-large). 1985 Ga. Laws 4406. Moreover, far from representing a common scheme nationwide, the use of a sole commissioner to exercise all legislative *and* executive authority over citizens is an aberration. Georgia is the only State in which any counties have commissions with only one member. See U.S. Bureau of the Census, *1987 Census of Governments*, Vol. 1, No. 2: Government Organization; Popularly Elected Officials [GC87(1)-2] (Jan. 1990); National Ass'n of Counties, *County Government Structure: A State by State Report* (July 1989). Even in Georgia, the use of a sole commissioner is rare. As of 1990, only 21 Georgia counties had a

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principles in its other redistricting actions. See *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991).

sole commissioner, Pet. App. 4-5, and, as petitioners observe (Br. 4), only 14 have a sole commissioner today.

2. Petitioners err in contending (Br. 15) that *Gingles* mandates that "[v]ote dilution must be measured against the number of positions in the existing structure." *Gingles* states that vote dilution is measured against the minority's potential to elect "in the absence of the challenged structure or practice." 478 U.S. at 50 n.17. The fact that respondents posit a structural change in the current number of elected commissioners in order to measure vote dilution is not a reason to reject their theory; any vote-dilution claim contemplates a change in the system of electing the official or officials in question. For example, a claim of vote dilution directed against at-large elections in multimember districts envisions a change to single-member districts.[11]

Nor is the theory underlying respondents' claim invalid because a court must make a threshold determination of whether the number of commissioners proposed by the plaintiffs in a Section 2 case provides a suitable benchmark for measuring dilution. It is true that that task may involve some line-

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[11] That the process of identifying black voters' potential to elect in this case may differ from the process of subdividing a multimember district described in *Gingles* simply reflects the different nature of the claims at issue. The Court has recognized that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume *arguendo* to be actionable today." *Voinovich* v. *Quilter*, 113 S. Ct. at 1157; see note 8, *supra*.

drawing. Line-drawing, however, is often required in making other Section 2 determinations, such as what constitutes *sufficient* geographical compactness of the minority population for the purpose of creating a single-member district. In this case, respondents' proposed benchmark was appropriate in light of the State's endorsement of five-member commissions, the prevalence of commissions of that size, and the use of five districts within Bleckley County itself for electing school board members. Even if the task of determining an appropriate benchmark were more difficult, however, this Court has made clear that the need to make difficult judgments does not "justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Chisom* v. *Roemer*, 111 S. Ct. at 2368.

In a related context, this Court has articulated principles to guide federal courts in determining whether federal law may be invoked to require a modification in the size of a legislative body. In *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 200 (1972), this Court held that a district court abused its discretion in "drastically changing" the size of a State's legislative body in order to remedy a one-person, one-vote violation. At the same time, the Court observed that it would "not disapprove a court-imposed minor variation from a State's prescribed figure when that change is shown to be necessary to meet constitutional requirements." *Id.* at 199.

Respondents' dilution theory does not require petitioners to make *any* departure from Georgia law or policy, since five-member commissions are the rule in Georgia, not the exception. There is, accordingly, a firm basis for concluding that the dilution of the

minority vote in electing a single member to Bleckley County's commission is cognizable under Section 2.

This case presents no issue as to whether plaintiffs can challenge the size of an existing multimember council or commission as a dilutive practice.[12] The only question presented here is whether the practice of electing a sole commissioner, rather than a multimember commission, can be challenged. That practice is distinctive. The practice of electing a sole commissioner has an inherent tendency to dilute the voting strength of a minority. Indeed, there is probably no practice that has a greater dilutive potential. And the highly unusual nature of Bleckley County's sole-commissioner system renders it particularly suspect under Section 2. See S. Rep. No. 417, 97th Cong., 2d Sess. 29 & n.117 (1982); see *Gingles*, 478 U.S. at 37. Thus, regardless of whether plaintiffs may successfully challenge the size of a multimember body as a dilutive practice under Section 2, a challenge to the election of a sole commissioner is permissible.

C. Analysis Under Section 2 Does Not Ignore State Policy Interests

Finally, petitioners contend (Br. 37-40) that allowing a challenge to the practice of electing a sole commissioner would invite an impermissible intrusion on state policy interests. That contention mis-

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[12] Some courts have rejected that type of claim. See *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 946-947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Romero* v. *City of Pomona*, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989); see also *Overton* v. *City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) (Jones, J., concurring).

conceives the way in which state interests are taken into account in evaluating a Section 2 claim.

In *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, *supra*, this Court explained that, under the totality of the circumstances that bear on the application of the results test under Section 2, a State may advance its "interest in maintaining an electoral system" as a factor to be considered. 111 S. Ct. at 2381. "A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry." *Ibid.* The Court also indicated that, if a violation is established, the State's interests and policies underlying its electoral system are relevant at the remedial stage. *Id.* at 2380.

Under *Houston Lawyers' Ass'n*, petitioners' justifications for electing a single individual to constitute its county commission may be considered on a case-by-case basis in determining whether a violation has been established; those justifications are part of the totality of the circumstances that form the context of the alleged violation. The record in this case, however, does not indicate that petitioners established a justification for retaining a sole commissioner that outweighs the substantial dilution of black voters' ability to elect representatives of their choice. While the district court found that petitioners' interest in electing a sole commissioner is not "tenuous," Pet. App. 10, the interest asserted by petitioners—that the election of a sole commissioner is "economical and efficient," Pet. Br. 7-8—is not especially strong in view of the unusual character of the sole-commissioner approach and the many examples of workable multimember commissions in other counties (including counties that are smaller than Bleckley County) in Georgia and elsewhere throughout the Nation.[13]

That a Section 2 violation may be established in this case does not mean that all practices of electing a single individual to office are open to invalidation. Positions of executive leadership are frequently entrusted to a single individual—as exemplified by the Constitution's vesting of the executive power in one President U.S. Const. Art. II, § 1, Cl. 1. A State will often have a compelling interest in electing a single official to perform executive functions, and it can support that interest by reference to long and widely followed traditions. See *The Federalist* No.69, at 415 (A. Hamilton) (C. Rossiter ed. 1961) ("I proceed now to trace the real characters of the proposed executive * * *. The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate.") To permit a plaintiff to seek multiple officers for such positions would be a radical departure from this country's political traditions, and there is no evidence in the history of the Voting Rights Act that Congress intended that consequence. Cf. *Chisom* v. *Roemer*, 111 S. Ct. at 2364.

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[13] Petitioners err (Br. 38) in suggesting that *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), would require a clear statement by Congress before a court could require a change in the number of commissioners. Because Congress expressly relied on its power to enforce the Civil War Amendments in enacting Section 2, see S. Rep. No. 417, *supra*, at 39-43, and because the Voting Rights Act clearly regulates state voting practices, *Gregory* is not relevant here. See *Chisom*, 111 S. Ct. at 2372-2373 (Scalia, J., dissenting).

In contrast, the commission in Bleckley County exercises all legislative as well as executive functions, including the power to set tax rates. Ga. Code Ann. § 36-5-22.1 (1987). That is an extraordinary concentration of power in a single elected official. Compared to the traditional practice of electing a single mayor, sheriff, coroner, clerk of court, school superintendent, or governor, there is no historical or strong functional interest in assigning to a single individual all of the legislative and executive functions that Georgia law delegates to the county's governing body. Bodies that exercise such mixed functions are typically composed of multiple members.

Consistent with the foregoing principles, the Eleventh Circuit, while permitting minority voters to challenge the practice of electing a sole commissioner, has rejected the view that Section 2 may be used to alter the practice of electing a single person to offices such as lieutenant governor, sheriff, probate judge, and tax collector. See *Dillard* v. *Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987); *United States* v. *Dallas County Comm'n*, 850 F.2d 1430, 1432 n.1 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989). Accordingly, this Court's affirmance of the Eleventh Circuit's holding that Section 2 is violated by the practice of electing a sole county commissioner in this case would in no way suggest that all traditional single-member executive offices are subject to challenge under Section 2.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DENNIS J. DIMSEY
IRVING GORNSTEIN
Attorneys

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia, and ROBERT JOHNSON, individually and in his official capacity as superintendent of elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

HERBERT M. WACHTELL
Co-Chair
WILLIAM H. BROWN, III
Co-Chair
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
FRANK R. PARKER
BRENDA WRIGHT

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

ANTONIA B. IANNIELLO
(Counsel of Record)
MARTIN D. SCHNEIDERMAN
RODERICK L. THOMAS

STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Amicus Curiae

Dated: May 19, 1993

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. *Holder v. Hall,* 113 S. Ct. 1382 (1993).

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Respondents.

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---

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Com-

mittee's work. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the past thirty years, and has frequently represented litigants before this Court, *see, e.g., Clark v. Roemer*, 111 S. Ct. 2096 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

SUMMARY OF ARGUMENT

The Eleventh Circuit properly concluded that the Voting Rights Act permits minority voters to challenge as dilutive Bleckley County's governance by a single county commissioner, rather than a multi-member board of commissioners. Without any basis in the statute or legislative history, petitioners ask this Court to carve out an exception from Section 2 for single-member offices. This attempt conflicts with this Court's rejection of such an exception in *Houston Lawyers' Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991), and conflicts with this Court's analogous Section 5 jurisprudence. The Act's language, legislative history, and purpose demonstrate that Congress intended the Act to cover all elections and to eliminate any structure or procedure that results in minority vote dilution.

The concentrated power of Bleckley County's sole commissioner form of government is an extreme form of at-large election that is non-existent in other states and highly unusual even in Georgia. In determining whether minority votes were diluted by this structure, the Eleventh Circuit properly considered a five-member commission as a benchmark for measuring vote dilution because the use of a five-member commission is firmly rooted in state law and practice in Georgia. Indeed, Georgia law specifically authorizes Bleckley County to adopt a five-

member commission. Because respondents are seeking an alteration of the election system that would *conform* the practice in Bleckley County to the practice existing throughout most of Georgia, it is simply unrealistic to argue that altering the sole-commissioner government would be unduly disruptive of established state policy.

Determining an accepted benchmark for a vote dilution claim is not a novel exercise under the Voting Rights Act. In the context of challenges to at-large, multi-member election schemes, the accepted benchmark is a voting plan with single-member districts. Similarly, when a five-member commission form of government is in general use throughout a state, that standard-sized commission provides an available benchmark for a challenge to a sole-commissioner form of government.

Permitting respondents to challenge the discriminatory impact of Bleckley County's sole-commissioner government, therefore, creates no right to proportional representation, contrary to petitioners' argument. Georgia's common practice of using a five-member commission, and the availability of this state-law benchmark for respondents' vote dilution claim, means that recognizing respondents' claim does not create an unlimited right to alter the size of the elected body arbitrarily until one or more majority black districts can be created.

Finally, elections for single-member offices may give rise to a number of Section 2 claims. The violation alleged in this case is one example of the many ways a single-member office may violate Section 2. Single-member offices may be coupled with a wide variety of mechanisms that dilute the votes of minority groups—such as majority vote requirements, discriminatory slating, and the establishment of difficult registration and voting procedures. Federal courts must retain the authority to eliminate dilutive mechanisms in a manner that gives minority voters an equal opportunity to participate in the political process and to elect representatives of their choice.

ARGUMENT

I. SECTION 2 OF THE VOTING RIGHTS ACT APPLIES TO THE PRACTICE OF ELECTING A SOLE COUNTY COMMISSIONER.

A. This Court Has Held That There Is No Single-Member Office Exception to Section 2.

Petitioners urge this Court to adopt a "single-member office" exception to the Voting Rights Act. They argue that if minority groups are not able to elect their preferred candidate to a single-member office, vote dilution cannot occur because "there can be no equal opportunity for representation within an office filled by only one person." Pet. Br. at 19. This view is irreconcilable with Section 2.[1]

In *Houston Lawyers' Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991), this Court squarely held that there is no "single-member office" exception to Section 2. Plaintiffs challenged as dilutive the at-large, countywide method of electing Texas trial court judges in ten counties. An *en banc* majority of the Fifth Circuit held that the results test of Section 2 did not apply to judicial elections since they were not "representatives" within the statutory language of Section 2. 914 F.2d 620 (5th Cir. 1990). In his concurrence, Judge Higginbotham characterized the trial judges "as single-office holders instead of members of a multi-member body" because each exercises his or her authority independent of the other judges serving in the same area or on the same court. 914 F.2d at 649. Relying upon the same case petitioners rely upon here, Judge Higginbotham advocated

[1] Commentators uniformly have criticized the single-member exception as inconsistent with the Voting Rights Act. *See, e.g.*, Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1 (1991); Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 Mich. L. Rev. 2199 (1990).

a single-member office exception since " '[t]here can be no equal opportunity for representation within an office filled by one person.' " 914 F.2d at 649 (quoting *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986)).

This Court reversed the Fifth Circuit, holding that "the coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected." 111 S. Ct. at 2380. In so holding, this Court rejected a single-member exception, concluding that the "concerns expressed in Judge Higginbotham's concurring opinion" were not relevant "to the threshold question of the Act's coverage."[2] *Id.* The single-member office structure was possibly "relevant either to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2" or relevant "to a consideration of possible remedies in the event a violation is proved." *Id. Houston Lawyers'* thus stands for the proposition that single-member offices are not exempt from challenge under Section 2.[3] At most, the state's interest in maintaining such a structure should be consid-

[2] This holding necessarily rejects the contrary language in *Butts* relied upon by Judge Higginbotham. In any event, the *Butts* decision did not involve a challenge to a single-member office, but only involved a challenge to a runoff election rule. The court expressly stated that "[w]e need not determine whether [an equal opportunity for representation] could ever be denied in the context of an election to a single-member office" and restricted its holding to the determination that the runoff requirements do not violate the Voting Rights Act. *Butts*, 779 F.2d at 149.

[3] *Houston Lawyers'* also rejected *per se* rules that exclude categories of elections. *See* 111 S. Ct. at 2381. This approach is mandated by the Act's "functional" view of the political process in asking whether minority voters enjoy an equal opportunity to participate in the electoral process. S. Rep. No. 417, 97th Cong., 2d Sess. 21, 30 n.120 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 198, 208.

ered as one factor in the "totality of the circumstances" inquiry.

Petitioners' attempt to exclude one particular claim from the purview of Section 2 also conflicts with this Court's conclusion that the Voting Rights Act does not provide piecemeal coverage. The protection of minority voters' unitary right to an equal opportunity "to participate in the political process and to elect representatives of their choice" cannot be bifurcated into two kinds of claims—one covered and the other beyond the reach of the Act. *See Houston Lawyers'*, 111 S. Ct. at 2380; *Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991). Petitioners concede that Section 2 would prohibit the *purposeful* adoption of a single-member office as a means to "defuse black voting strength." Pet. Br. at 40 n.32. But *Houston Lawyers'* and *Chisom* made it clear that the scope of Section 2's coverage cannot depend upon whether the alleged racial discrimination is intentional. The attempt to exclude vote dilution claims not supported by direct evidence of a discriminatory purpose also expressly conflicts with Congress' adoption of the "results test" in the 1982 amendments to the Voting Rights Act. *Gingles*, 478 U.S. at 43-46.[4] Petitioners' effort to apply Section 2 selectively therefore must be rejected under *Houston Lawyers'* and *Chisom*.

This Court recently confirmed that "Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview." *Chisom v.*

[4] In the context of an election for a single-member office, Section 2 also would clearly prohibit purges of registration rolls, threats of reprisals against minority voters, the establishment of difficult registration and voting procedures, and allegations of a discriminatory slating process. This Court recognized, for example, that Section 2 would cover the practice of closing the polls at noon for a single-member office if it resulted in an "abridgment of a racial minority's opportunity to vote and to elect representatives of their choice." *Houston Lawyers'*, 111 S. Ct. at 2381.

Roemer, 111 S. Ct. at 2362; S. Rep. No. 417, at 2, *reprinted in* 1982 U.S.C.C.A.N. 177, 179.[5] Since the county commissioner is elected by popular vote, the Voting Rights Act does not permit the denial of the right of minority voters to participate in the political process and to elect representatives of their choice.

B. This Court's Section 5 Jurisprudence Supports the Conclusion That Section 2 Covers the Practice of Electing a Sole Commissioner.

This Court's interpretation of Section 5, which is governed by the same definitional terms as Section 2, establishes that the practice of electing a sole commissioner is covered by Section 2. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), Mississippi sought to change the method of selecting the county school superintendent, among other offices. The Court recognized that a change in the method of selecting that single official was subject to Section 5 requirements since it might dilute the voting strength of the county's citizens. *Id.* at 550-51, 569-70.

Similarly, in *City of Lockhart v. United States*, 460 U.S. 125 (1983), this Court interpreted the same "standard, practice or procedure" language in Section 5 as applying to changes in the size of an elected body. Lockhart initially was governed by a commission consisting

[5] The practice of electing a single official to an office in a particular geographic area is clearly a "standard, practice, or procedure" within the meaning of Section 2. 42 U.S.C. § 1973(a) (1988). The all-inclusive statutory language is not selective with respect to the type of office or structure covered by the Act. In fact, the legislative history is replete with statements that the Act applies to "all elections." *See, e.g.*, H.R. Rep. No. 439, 89th Cong., 1st Sess. 32 (1965). The United States similarly has acknowledged that Section 2 covers all elections. When the original Voting Rights Act was passed in 1965, the Attorney General stated that "[*e*]*very election* in which registered voters are permitted to vote would be covered." *Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Committee*, 89th Cong., 1st Sess. 21 (1965) (emphasis supplied).

of a mayor and two commissioners. Since the elections for the commissioner posts used a "numbered post" system, however, "each race was effectively a separate election for a separate office." *Id.* at 127. Lockhart subsequently adopted a new charter and chose to be governed by a city council consisting of a mayor and four councilmen. This Court concluded that the addition of the two seats was subject to preclearance under Section 5.[6] *Id.* at 131; *see also Clark v. Roemer*, 111 S. Ct. 2096 (1991) (addition of new judgeships in existing judicial districts has a potential for discrimination and is covered by Section 5).

The Solicitor General has suggested that interpretations of Section 5 are not relevant to Section 2 because "the inquiry under Section 5 is quite distinct from that under the Section 2 results test." S.G. Opp. Cert. at 12-13 n.11. The Solicitor General incorrectly implies that retrogression of minority voting strength cannot violate Section 2 unless it is the product of intentional discrimination. Federal courts have acknowledged, however, that retrogression claims are cognizable under Section 2 as well as Section 5.[7] Moreover, the Solicitor General's

[6] Just last term this Court reaffirmed the principles of *Allen* and *City of Lockhart*. *See Presley v. Etowah County Comm'r*, 112 S. Ct. 820, 827-28 (1992).

[7] *See Badillo v. City of Stockton*, 956 F.2d 884, 890-91 (9th Cir.) (reduction in the number of city council seats presented a potential violation of Section 2), *amended*, Nos. 89-15987, 89-16124, 1992 U.S. App. LEXIS 7738 (9th Cir. Apr. 27, 1992); *Nixon v. Kent County, Michigan*, 790 F. Supp. 738 (W.D. Mich. 1992) (assumes that reduction of county commission from 21 to 19 members presents a cognizable claim under Section 2); *cf. Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) (proposed redistricting plan for the Chicago City Council, which decreased the majority black wards from nineteen to seventeen, violated Section 2 because it had a retrogressive effect), *cert. denied*, 471 U.S. 1135 (1985). Commentators also have concluded that Section 5 review requires jurisdictions to meet the mandates of both sections. *See* Laughlin McDonald, *Racial Fairness—Why Shouldn't It Apply to Section 5 of the Voting Rights Act*, 21 Stet. L. Rev. 847 (1992); Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 Yale L.J. 139 (1984).

statement in this case is contrary to the position he urged upon this Court only two years ago in *Chisom v. Roemer*. In that case, the Solicitor General argued that this Court's interpretation of Section 5 was directly relevant to the proper interpretation of Section 2:

> Two decisions by this Court construing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, support our conclusion [that Section 2 applies to judicial elections]. The Court has twice held that Section 5 . . . applies to the election of state judges. *Martin v. Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court); *Brooks v. Georgia State Bd. of Elections*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court). Congress used the same operative language (*i.e.*, "voting qualification", etc.) in defining the scope of Sections 2 and 5 of the Act. Inasmuch as Congress is presumed to give terms the same meaning throughout a statute, *see Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983), this Court's holdings in *Haith* and *Brooks* support the proposition that Section 2 applies to judicial elections.

See U.S. Br. in *Chisom v. Roemer* and *United States v. Roemer*, Nos. 90-757 and 90-1032, at 14-16 (footnotes omitted). This Court agreed with the Solicitor General's argument in *Chisom*. Relying upon the "close connection" between the scope of the two sections, this Court held that judicial elections are covered under Section 2, noting that "Section 5 uses language similar to that of § 2 in defining prohibited practices." *Chisom*, 111 S. Ct. at

2367. The Solicitor General's arguments in this case provide no basis for holding that changes in the size of an elected body are covered by Section 5 of the Voting Rights Act, but that Section 2 excludes any inquiry into the dilutive effect of maintaining a sole commissioner rather than employing a multi-member commission authorized by state law.[8]

II. MINORITY PLAINTIFFS MAY ESTABLISH VOTE DILUTION BY THE USE OF A SOLE COUNTY COMMISSIONER FORM OF GOVERNMENT WHEN STATE PRACTICE PROVIDES A BENCHMARK FOR INCREASING THE SIZE OF THE ELECTED BODY.

A. Bleckley County's Sole Commissioner Is an Extreme Form of At-Large Election and Is Highly Unusual Even in Georgia.

The concentrated power of the single county commissioner in this case dramatically illustrates the dilutive and discriminatory potential of the challenged election structure. Bleckley County's sole commissioner has the "exclusive jurisdiction" to levy county taxes, to examine and audit all county funds, to control all county property, and to make "rules and regulations for the support of the poor of the county, for the county police and patrol, [and] for the promotion of health." Ga. Code Ann. § 36-5-22.1 (1992). The county commissioner also has the power to fill vacancies in county offices. *Id.* It is difficult to imagine a more powerful local official.

Bleckley County's form of governance is highly unusual. Georgia is the only state that has such a form—

[8] In determining the scope of Section 2's coverage, it is irrelevant that the sole-commissioner government in Bleckley County does not constitute a change from prior practice. Section 2's coverage does not depend upon the length of time a challenged practice has been in effect. *See, e.g., Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1210 (5th Cir. 1989).

no other counties in the United States have a sole county commissioner.[9] Even in Georgia, Bleckley County's sole county commissioner is unusual—an overwhelming majority of counties in Georgia have multi-member commissions.[10] Most counties in the state are governed by a county commission consisting of 3, 5, or 7 members. A five-member commission is the most common. In fact, the Georgia legislature authorized Bleckley County to adopt by referendum a multi-member commission consisting of five commissioners elected from single-member districts and a chairman elected at-large. 1985 Ga. Laws 4406.

In its present form, Bleckley County's sole commissioner is the most extreme form of at-large elections. Combined with the majority vote requirement, this highly unusual structure virtually ensures that minority voters will be excluded from effective participation in the political process.

B. State Practice Provides an Acceptable Benchmark for Determining Whether Minority Votes Are Diluted by the Challenged Structure.

To support their argument that this electoral practice is beyond the reach of a vote dilution claim, petitioners assert that minority voters cannot have a "share of" a single-member office. Pet. Br. at 19-20. Their argument assumes that the county commissioner position must be held by a single person with all the powers remaining in that office. The Voting Rights Act provides no basis for such a limitation.

The "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and his-

[9] 1 Dep't of Commerce, *1987 Census of Governments, No. 2: Government Organization; Popularly Elected Officials* [GC87(1)-2] (issued Jan. 1990).

[10] *See* Georgia Department of Community Affairs, *County Government Information Catalog* (1989).

torical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. In the context of a challenge to a multi-member districting scheme, this Court in *Gingles* developed a three-part test for determining whether vote dilution has occurred. The minority group must show that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) it is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate. *Id.* at 50-51.

The essential question in such an inquiry is defining the benchmark for determining whether minority votes are diluted by the challenged structure. In its determination that minority voters successfully established vote dilution, the Eleventh Circuit used a five-member county commission as a benchmark for determining whether minority voters could constitute a majority in a single-member district. Pet. App. at 74. The court recognized that

> it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive.

Id. (emphasis in original). Using Bleckley County's five-member school board size and districts as a benchmark, the court concluded that the evidence at trial established that black voters could comprise a majority of the electorate in one of the five districts in Bleckley County. *Id.*[11]

[11] The district court similarly concluded that "[i]f the county commission were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority 'safe' district . . . would result." Pet. App. at 12.

Petitioners object to such a benchmark, arguing that the first *Gingles* precondition requires minorities to show a potential to elect in a government body having one commissioner.[12] But if the practice of using a sole commissioner is covered by Section 2, such an interpretation would automatically bar relief whenever black citizens formed less than a majority in the jurisdiction as a whole. Since that would always be the case in challenges to the practice of electing a sole commissioner, the argument is merely another way of saying that single-member offices cannot be challenged under Section 2. That reading conflicts with this Court's holding that a single-member office theory "cannot suffice to place an election for a single-member officeholder entirely beyond the coverage of § 2 of the Act." *Houston Lawyers'*, 111 S. Ct. at 2381.[13]

Petitioners nevertheless argue that a departure from using the *challenged structure* as a benchmark has no limits. Pet. Br. at 26-27. Petitioners fear that respondents may simply add seats to an existing governing body until "proportional representation" is met. *Id.* The argu-

[12] Unlike the second and third preconditions discussed in *Gingles*, this first precondition is the only *Gingles* precondition that has no source in the language of Section 2 or in the Senate Report factors. *See* S. Rep. No. 417, at 28-29. This precondition accordingly should not be rigidly interpreted in a manner that would frustrate the broad remedial purposes of Section 2. As this Court recognized in *Chisom*, 111 S. Ct. at 2368, the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination."

[13] The argument also ignores the purpose of the first *Gingles* precondition. Minority voters must show that they possess the potential "to elect representatives *in the absence of the challenged structure or practice.*" *Gingles*, 478 U.S. at 50 n.17 (emphasis supplied). That showing is integral to demonstrating that minority voters "have been injured by that structure or practice." *Id.* Since minority voters have challenged the practice of electing a sole commissioner, *Gingles* requires them to show that they would have the potential to elect representatives in the absence of the single-member practice.

ment fails to recognize that the benchmark chosen by the Eleventh Circuit is firmly rooted in state law and practice.

The use of a five-member commission is not based on a right to proportional representation, but is based on the state's common practice of using a five-member commission. Five-member county commissions are the most common form of governance in Georgia.[14] The state legislature also specifically authorized Bleckley County to adopt by referendum a multi-member commission consisting of five commissioners elected from single-member districts and a chairman elected at-large. 1985 Ga. Laws 4406. The Eleventh Circuit also based its benchmark upon the size and districts for Bleckley County's school board—the only other countywide multi-member body. State law and practice, as well as local practice, therefore provide the basis for a five-member benchmark for determining a Section 2 violation.

Determining an accepted benchmark is not a novel concept in the Voting Rights Act. Redressability of the injury is always based on the availability of an accepted benchmark against which to measure fair minority representation. In the context of challenges to at-large, multi-member election schemes, the accepted benchmark is a voting plan with single-member districts. In the context of challenges to other types of voting practices, such as restrictive voter registration practices, majority vote requirements, or numbered posts, the benchmark is a system without those requirements. Similarly, when a five-member commission form of government is in general use throughout a state, the standard-sized commission provides an available benchmark for a challenge to a sole-commissioner form of government. The availability of this benchmark means that recognizing respondents' vote dilution claim does not create an unlimited right to alter

[14] *See* Georgia Department of Community Affairs, *County Government Information Catalog* (1989).

the size of the elected body arbitrarily until one or more majority black districts can be created.

In addition to echoing petitioners' "proportional representation" argument, the Solicitor General has made another slippery slope argument, suggesting that the application of Section 2 to single-member offices would require more than one governor, or mayor, or similar office. S.G. Opp. Cert. at 11. The argument also ignores the state policy in this case that authorizes a larger governing body. Recognizing vote dilution here would not lead to three-person governorships or the like. Respondents here are seeking an alteration of the election system that would *conform* the practice in Bleckley County to the practice existing throughout most of Georgia and the United States. If a voting practice is dilutive measured against such a pre-existing state practice, it is simply unrealistic to argue that altering the practice would be unduly disruptive of established state policy.[15] By contrast, there is no benchmark in state practice in Georgia or anywhere else in the United States for a three-person governorship. Since Bleckley County's sole-commissioner government is the exception rather than the rule in the state, the state's interest in using only one commissioner is tenuous—a factor that contributes to a finding of vote dilution under the Senate Report. *See* S. Rep. No. 417,

[15] Petitioners argue that Congress did not intend to tread upon the electoral structure set up by the state, citing *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), which did not involve a challenge under the Voting Rights Act at all. Pet. Br. at 38-39. The balance between federal and state interests has already been considered by Congress in its enactment of the Voting Rights Act, however. The state's policy behind a particular electoral system is just one factor to be considered in determining whether there is a violation or whether a particular remedy is warranted. *Houston Lawyers'*, 111 S. Ct. at 2381 (the state's interest in maintaining a particular electoral structure "is merely one factor to be considered in evaluating the 'totality of circumstances'"). The prevalence of the five-member commission reveals that the state does not have a strong interest in its unusual single-member structure.

at 29 & n.117 (the policy behind the practice is tenuous if the challenged practice "departs from past practices or from practices elsewhere in the jurisdiction").

C. The Eleventh Circuit's Benchmark in This Case Is Consistent With Federal Practice in Single-Member Office Cases and Related Section 2 Litigation.

1. *Federal Courts Have Recognized That Section 2 Permits the Consideration of an Expanded Governing Body as a Benchmark for Determining Vote Dilution.*

Federal courts have recognized the authority under Section 2 to consider an expanded size to determine whether black citizens can constitute a majority in a single-member district.[16] In *Stallings*, the Eleventh Circuit held that, in considering whether there was a violation, the district court on remand must consider whether black citizens would constitute a majority in any district under either a three-member or a five-member commission plan. 829 F.2d at 1563. Such evidence was "highly relevant" to "whether black voters in Carroll County are sufficiently numerous and compact to constitute a majority in a single member district, if single member districts were created out of the one county district." *Id.*

Similarly, in *McNeil v. City of Springfield*, black voters challenged at-large elections for a five-member city council. In considering whether the minority group could demonstrate that it was "sufficiently large and geographically compact to possess the potential to elect representatives of its choice in the absence of the challenged structure or practice," 658 F. Supp. at 1020-24, the court expanded the size of the city council to ten members. The district court concluded that using this benchmark, which was expressly authorized by state law, one Springfield district would have a black majority. *Id.*

Petitioners cite three decisions that have suggested that a Section 2 violation must be based upon the number of positions in the existing body.[17] As an initial matter, these cases were wrongly decided since *Gingles* requires that plaintiffs demonstrate their ability "to elect representatives in the absence of the challenged structure or practice." *Gingles*, 478 U.S. at 50 n.17. In any event, the cases are distinguishable since plaintiffs were challenging the at-large method of electing their governing bodies.[18] Rather than challenging the election of a single-member office, plaintiffs in those actions challenged the practice of electing a multi-member body under an at-large system. That issue is not presented in this case, which involves a rare concentration of power in a sole county commissioner. Moreover, plaintiffs in *McNeil v. Springfield Park District* and *Romero* failed to provide any basis for using an expanded governing body as a benchmark for determining a Section 2 violation.[19] By

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[16] *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1563 (11th Cir. 1987); *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill.), *appeal dismissed*, 818 F.2d 565 (7th Cir. 1987). Moreover, federal courts have endorsed plans submitted by defendant jurisdictions that increase the size of a governing body as an option for remedying vote dilution. *See, e.g., Buchanan v. City of Jackson*, 683 F. Supp. 1545 (W.D. Tenn. 1988) (switching from three-member commission form of government to mayor-council form with nine council members).

[17] *See McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946-47 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989); *Romero v. City of Pomona*, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989), *overruled on other grounds*, 914 F.2d 1136, 1141 (9th Cir. 1990); *see also Overton v. City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) (Jones, J., concurring).

[18] *McNeil*, 851 F.2d at 938; *Romero*, 883 F.2d at 1420; *Overton*, 871 F.2d at 530.

[19] *See McNeil*, 851 F.2d at 946-47; *Romero*, 883 F.2d at 1425 n.10. Nor does *Overton* dispute the analysis here. The district court in *Overton* actually considered an expansion of the city council to determine geographic compactness, but nevertheless held that plaintiffs had not proven their Section 2 claim. The Fifth Circuit's affirmance did not overturn the conclusion that an expanded council could be considered. 871 F.2d at 535-36, 543.

contrast, this case involves an express state policy (and practice) authorizing a larger commission. As discussed above, the state has no strong interest in the present single-member structure,[20] nor is any such interest compromised by restructuring or expanding the commission as a means to rectify vote dilution and to diminish the concentration of power in a single-member office.

2. *Federal Courts Have Recognized That a Reduction in the Size of a Governing Body May Be Challenged Under Section 2.*

In an analogous area, federal courts have recognized that a *reduction* in the size of a governing body has a clear potential for discrimination and is subject to challenge under Section 2.[21] Section 2 clearly would be violated if such a change had a discriminatory impact. In considering whether minority voters could satisfy the first *Gingles* precondition, a court would not use as a benchmark the reduced size of the challenged governing body.[22] The court would appropriately use the size of the previous governing body since it would provide a ready benchmark for measuring the discriminatory impact on the political opportunities for minority citizens. The result should be

[20] For purposes of this analysis, the interests of the state and locality are identical. Since local governments derive their delegated powers entirely from states, localities exercise authority as agents of the states. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 478-79 (1968) (relying upon the exercise of these delegated powers by local governing bodies as the basis for extending the one-person, one-vote principle to local legislative elections).

[21] *See, e.g., Badillo v. City of Stockton*, 956 F.2d at 890-91 (reduction in the number of city council seats presented a potential violation of Section 2), and *Nixon v. Kent County*, 790 F. Supp. 738 (assumes that reduction of county commission from 21 to 19 members presents a cognizable claim under Section 2).

[22] This is entirely consistent with the first *Gingles* precondition, which requires that minority voters show that they can elect representatives "in the absence of the challenged structure or practice." 478 U.S. at 50 n.17.

no different when the customary state practice is to use local governing bodies of a particular size, and minorities can show that their political opportunities have been limited by the local jurisdiction's decision to depart from that usual state practice.

D. The Slippery Slope Arguments Raised by Petitioners and the Solicitor General Ignore the Careful Limits This Court Placed Upon Vote Dilution Challenges Under the Voting Rights Act.

In the final analysis, petitioners and the Solicitor General clearly view the choice of an acceptable benchmark in isolation—as if that decision alone may satisfy respondents' burden of proof. *Gingles*, however, articulated three preconditions that respondents must satisfy. Once the threshold inquiry is made, federal courts then inquire into the "totality of the circumstances." This inquiry contemplates a "searching practical evaluation of the 'past and present reality' " of the community and a " 'functional' view of the political process." *Gingles*, 478 U.S. at 45. " 'This determination is peculiarly dependent on the facts of each case,' and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* at 79 (citation omitted). This is precisely why this Court concluded that single-member office concerns may be relevant to the "totality of the circumstances." *Houston Lawyers'*, 111 S. Ct. at 2380.

Consistent with this analytical framework, Bleckley County's single-member county commission dramatically demonstrates minority vote dilution. As the Eleventh Circuit recognized, the black population in Bleckley County resides in a contiguous area that could easily constitute a majority of the electorate in one of five single-member districts. Pet. App. at 74. The court also found substantial evidence that blacks in Bleckley County are politically cohesive and that the white majority usually votes as a bloc. *Id.* at 75-85. Finally, the violation was well-supported by the extremely limited electoral success

of blacks and Bleckley County's long history of racial discrimination. *Id.* The use of a sole-commissioner government was thus not the only basis for the finding that the election structure unlawfully dilutes minority voting strength and violates Section 2; rather, that finding depended upon application of all of the factors relevant under Section 2's "totality of the circumstances" test. It is precisely a finding on these factors that will constrain courts from sliding down the slippery slope the petitioners fear.

III. EVEN IF, UNLIKE IN THIS CASE, THE NUMBER OF COMMISSIONERS COULD NOT BE INCREASED BECAUSE OF THE ABSENCE OF AN AVAILABLE BENCHMARK FOR A FIVE-MEMBER BODY, A SINGLE-MEMBER OFFICE IS SUBJECT TO CHALLENGE UNDER SECTION 2.

As established above, it is clear that the Eleventh Circuit properly concluded that respondents satisfied the first *Gingles* precondition since blacks could constitute a majority of the electorate in one of five single-member districts. Even in cases where no benchmark exists for increasing the size of the governing body, however, plaintiffs may still challenge election features having a racially discriminatory effect.

Essential to the concept of minority vote dilution is the interaction between white bloc voting against minority-supported candidates and electoral mechanisms that have a potentially vote dilutive effect. A single-member office may be coupled with a wide variety of practices that are intended to, or have the effect of, diluting the votes of minorities. Federal courts must retain the authority to eliminate this vote dilution in a way that gives minority voters an equal opportunity to participate in the political process and to elect representatives of their choice.[23]

[23] Congress provided that a federal court must "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, at 31 (footnote omitted).

One example of a dilutive mechanism that may be challenged regardless of the multi-member or single-member form of office at issue is a majority vote requirement. Majority runoff elections require that a winning candidate receive a majority rather than a plurality of votes cast. If no candidate receives a majority, the two top finishers compete in a runoff election. Even though a minority candidate may win a plurality when he or she runs against two or more white candidates, the runoff requirement ensures that a cohesive white voting bloc can control the outcome of the election. *See, e.g., White v. Regester,* 412 U.S. 755, 766 (1973) (majority vote requirement "enhanced the opportunity for racial discrimination").

Other practices or mechanisms may exacerbate the dilutive effect of single-member offices. States and localities may establish difficult registration or voting procedures "that on their face are not discriminatory but in fact discourage a group of potential voters from casting a ballot." [24] Vote dilution also may occur by using slating groups to control the nomination process. Slating often involves the creation of a package or slate of candidates by an organization with sufficient financial or political strength to make the election merely a stamp of approval of the pre-ordained candidate group. Discriminatory slating thus operates to control effective access of minorities to the ballot.

Elections for single-member offices thus may give rise to a number of Section 2 claims. The violation alleged in this case is just one of many possible ways that elec-

[24] Chandler Davidson, *Minority Vote Dilution: An Overview, in* Minority Vote Dilution 6 (C. Davidson ed. 1984).

tions for single-member offices may cause vote dilution. This Court should eschew any interpretation of the Voting Rights Act that would place election practices outside the protection of Section 2 merely because a single-member office, rather than a multi-member office, is at issue. Only then can federal courts ensure that the Voting Rights Act provides minority voters the right to a meaningful voice in electoral decisions.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

HERBERT M. WACHTELL
Co-Chair
WILLIAM H. BROWN, III
Co-Chair
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
FRANK R. PARKER
BRENDA WRIGHT

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

ANTONIA B. IANNIELLO
(Counsel of Record)
MARTIN D. SCHNEIDERMAN
RODERICK L. THOMAS

STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Amicus Curiae

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